

1 Scott H. Jacobs (SBN 81980)
2 Christopher O. Rivas (SBN 238765)
3 REED SMITH LLP
4 355 S. Grand Avenue, Suite 2900
5 Los Angeles, CA 90071
6 Telephone: 213.457.8000
7 Facsimile: 213.457.8080

8 Attorneys for Defendants
9 WMC Mortgage, LLC and
10 GE Consumer Finance, Inc.

11 UNITED STATES DISTRICT COURT

12 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

13 PATRICIA C. BARBERA,

14 Plaintiff

15 vs.

16 WMC MORTGAGE CORPORATION, a
17 California corporation; aka WMC Direct, a
18 California Business Entity; GE Consumer
19 Finance, a unit of General Electric
20 Company; Select Portfolio Servicing Corp,
21 a Utah Corporation; Fairbanks Holding
22 Corporation, a Delaware Corporation; and
23 Land Title Company of Marin, a
24 California Business Entity;
25 Does 1 thru 100, inclusive.

26 Defendants.

Case No.: 3:08-cv-2677-PJH

**DEFENDANTS WMC MORTGAGE,
LLC AND GE CONSUMER
FINANCE, INC.'S REQUEST FOR
JUDICIAL NOTICE IN SUPPORT OF
THEIR ADMINISTRATIVE MOTION
TO CONSIDER WHETHER CASES
SHOULD BE RELATED**

REED SMITH LLP
A limited liability partnership formed in the State of Delaware

Pursuant to Federal Evidence Code Section 201, WMC Mortgage, LLC (“WMC Mortgage”) (successor in interest to “WMC Mortgage Corporation”) and GE Consumer Finance (“GECF”) (collectively referred to as “Defendants”) hereby request that this Court take judicial notice of the following documents in support of their Administrative Motion to Consider Whether Cases Should Be Related, copies of which are attached hereto as exhibits:

<u>Exhibit</u>	<u>Description</u>
-----------------------	---------------------------

- | | |
|---|---|
| A | On July 23, 2004, Plaintiff filed a complaint against Defendants WMC Mortgage and GECF in Superior Court of California, San Francisco County. A true and correct copy of Plaintiff’s 2004 Complaint is attached hereto as Exhibit “A.” |
| B | On September 3, 2004, Defendants removed the action to the Northern District of California, San Francisco Division. A true and correct copy of Defendants’ 2004 Notice of Removal is attached hereto as Exhibit “B.” |
| C | On December 13, 2004, Plaintiff voluntarily dismissed GECF without prejudice. A true and correct copy of Plaintiff’s Notice of Voluntary Dismissal is attached hereto as Exhibit “C.” |
| D | On January 19, 2006, the Honorable Judge Sandra Brown Armstrong of the Northern District Court of California, San Francisco Division, dismissed, <i>with prejudice</i> , all of Plaintiff’s federal causes of action against WMC Mortgage and remanded Plaintiff’s state claims to the Superior Court of California for the County of San Francisco. A true and correct copy of this Court’s Order Granting WMC |

<u>Exhibit</u>	<u>Description</u>
----------------	--------------------

Mortgage's Motion to Dismiss with Prejudice is attached hereto as Exhibit "D."

E	On 2006, the San Francisco Superior Court dismissed, <i>with prejudice</i> , all of Plaintiff's state causes of action against WMC Mortgage. A true and correct copy of the San Francisco Superior Court's Judgment Dismissing With Prejudice Plaintiff's State Claims is attached hereto as Exhibit "E."
---	---

F	On May 28, 2008, Defendants filed a Notice of Removal with the Northern District of California, San Francisco Division, to remove the present action to federal court. A true and correct copy of Defendant's 2008 Notice of Removal is attached hereto as Exhibit "F."
---	---

DATED: June 2, 2008

REED SMITH LLP

By /s/ Christopher O. Rivas
 Scott H. Jacobs
 Christopher O. Rivas
 Attorneys for Defendants
 WMC Mortgage, LLC and
 GE Consumer Finance, Inc.

EXHIBIT A

1 JOHN G. WARNER (CA State Bar No. 046123)
2 Law Office of John G. Warner
21 Tamal Vista Blvd., Suite 196
3 Corte Madera, CA 94925
Telephone: (415) 924-2640
4 Facsimile: (415) 927-0608
Email: warnerwest@aol.com

5 Attorney for Plaintiff
6 Patricia C. Barbera

ENDORSED
FILED
San Francisco County Superior Court

JUL 23 2004

GORDON PARK-LI, Clerk
BY: JUN P. PANELO
Deputy Clerk

7 SUPERIOR COURT OF CALIFORNIA

8 COUNTY OF SAN FRANCISCO CASE MANAGEMENT CONFERENCE

9 UNLIMITED CIVIL DIVISION PLAN 1 JUL 23 2004 900.

10 CLASS ACTION

DEPARTMENT 212

11 Patricia C. Barbera,

Case No. **CCC 04433269**

12 Plaintiff,

13 vs.

14
15 WMC Mortgage Corp., a
16 California Corporation; WMC
Finance Co.; Apollo Management
17 L.P.; WMCDirect; GE Consumer
Finance, a unit of General
18 Electric Company; Fairbanks
Capital Corp., a Utah
19 Corporation; Fairbanks Capital
Holding Corp., a Delaware
20 Corporation; California Land
Title Company of Marin, a
21 California business entity;
Does 1 through 100, inclusive,

22 Defendants.
23

COMPLAINT TO BAR PREDATORY
LENDING AND OTHER UNFAIR BUSINESS
PRACTICES; FOR REMEDIES UNDER
CALIFORNIA CONSUMERS LEGAL
REMEDIES ACT AND VARIOUS FEDERAL
HOME LOAN PROTECTION STATUTES;
MONETARY DAMAGES FOR FRAUD, FOR
BREACH OF CONTRACT, ELDER ABUSE,
AND USURY; AND FOR RESCISSION OF
HOME LOAN MORTGAGE

CLASS ACTION

Demand for Jury Trial

Type of Case:
Unfair Business Practice

24 INTRODUCTION

25 1. Plaintiff Patricia Barbera brings this action on behalf
26 of herself, and separately on behalf of affected members of the
27 general public, to challenge the unjust, unlawful, unfair and
28 fraudulent business practices of defendants in the manner in

1 which they handle mortgage loans on residential property in
2 California, as is more fully alleged herein. Plaintiff seeks
3 compensatory damages, punitive damages, statutory penalties,
4 rescission, restitution, disgorgement of profits, attorney's
5 fees, and costs. In support thereof, plaintiff hereby complains
6 and alleges as follows:

7
8 PARTIES

9 2. Plaintiff Patricia C. Barbera ("plaintiff") is a 73-year
10 old individual residing at all material times in the County of
11 Marin, California.

12 3. At all material times, defendant WMC Mortgage Corp.
13 ("WMC"), formerly known as WMC Finance Co., was and is an entity
14 formed by Apollo Management L.P. and an individual named Leon
15 Black and others who acquired Weyerhaeuser Mortgage Company and
16 Weyerhaeuser Insurance Services. WMC is a California corporation
17 with its corporate headquarters in Woodland Hills, California.
18 It operates throughout California making loans on residential
19 property and also acting as the administrator for those loans.
20 WMC also operates defendant WMCDirect, WMC's online nationwide
21 business services website for mortgage brokers. WMC claims that
22 "since its launch, in June 1999, online loan submissions have
23 totaled more than \$31 billion."

24 4. On June 14, 2004, defendant GE Consumer Finance Co., the
25 consumer lending unit of the General Electric Company (NYSE: GE)
26 purchased defendant WMC Finance Co., including defendants WMC and
27 WMCDirect, from affiliates of defendant Apollo Management L.P.

28 5. At all material times, defendant Fairbanks Capital Corp.

1 was and is a Utah corporation that acted on behalf of WMC as the
2 servicer of WMC's loans including WMC's loan to plaintiff.

3 6. At all material times, defendant Fairbanks Capital
4 Holding Corp. was and is a Delaware corporation which fully owns
5 and controls as a subsidiary defendant Fairbanks Capital Corp.

6 7. At all material times, defendant California Land Company
7 of Marin was and is a title company with its principal business
8 office in Marin County, California.

9 8. Plaintiff is ignorant of the true names and capacities of
10 defendants sued herein as Does 1 through 100, and therefore
11 plaintiff sues these defendants by such fictitious names.
12 Plaintiff is informed and believes and thereon alleges that each
13 of the fictitiously named defendants, including any such
14 defendants that may be the agents, representatives, or parent or
15 subsidiary corporations of the named defendants, is responsible
16 in some manner for the occurrences, events, transactions, and
17 damages alleged herein, and that plaintiff's damages as
18 hereinafter set forth were proximately caused by the Doe
19 defendants. Plaintiff will amend her complaint to state the true
20 names and capacities of the Doe defendants when they have been
21 ascertained.

22 9. Plaintiff is informed and believes and thereon alleges
23 that each of the defendants, including the Doe defendants, acted
24 in concert with each and every other defendant, and intended to
25 and did participate in the events, acts, practices and courses of
26 conduct alleged herein, and each was a proximate cause of the
27 damages and statutory violations alleged herein. At all times
28 herein mentioned, each defendant was the agent or employee of

1 each of the other defendants and was acting within the course and
2 scope of such agency or employment.

3 10. Plaintiff did not discover her causes of action against
4 defendants Fairbanks Capital Corp., Fairbanks Capital Holding
5 Corp., and California Land Title Company until approximately ten
6 months ago when defendant WMC produced documents that plaintiff
7 had been requesting for nearly a year pursuant to written
8 discovery. These documents show that the Fairbanks defendants
9 subsequently became the servicer for plaintiff's loan and that
10 California Land Title Company of Marin had improperly processed
11 escrow documents required for a loan that plaintiff had obtained
12 from WMC.

13 11. Each of the following causes of action arises from a
14 home loan that WMC made to plaintiff that was intended primarily
15 for personal, family or household use. This loan was a
16 "federally related mortgage loan" within the meaning of the Real
17 Estate Settlement Procedures Act ("RESPA").

18 12. Plaintiff is informed and believes, and based thereon
19 alleges, that WMC is a major "high cost" residential mortgage
20 lender which has made more than ten billion dollars in
21 residential mortgage loans secured primarily by first mortgage
22 liens on personal residences in the State of California.
23 Plaintiff is further informed and believes, and based thereon
24 alleges, that WMC has been in the business of making residential
25 mortgage loans and home equity loans as a "high-cost" predatory
26 lender for many years, primarily in the State of California.

27

28

1
2 SUMMARY OF FACTS

3 13. In June, 1997, plaintiff was in a desperate financial
4 situation. She had pending against her a foreclosure action
5 initiated by another lender with respect to her personal
6 residence at 24 Caribe Isle, Novato, California. To avoid that
7 foreclosure, plaintiff obtained a loan from WMC in the amount of
8 \$322,500 at an annual percentage rate of 12.2573%.

9 14. On June 12, 1997, plaintiff executed loan documents at
10 California Land Title Company of Marin. During the close of
11 escrow, defendants failed to provide to plaintiff two written
12 notices of plaintiff's right to rescind within three days of
13 closing, and defendants failed to prepare and deliver accurate
14 disclosures that were mandated under what is called TILA (the
15 Truth in Lending Act, 15 U.S.C. sec. 1601. et. seq.) for the
16 close of escrow in a home mortgage transaction. Plaintiff
17 further alleges in this respect that defendants' failure to
18 provide these right to rescind notices and to prepare and deliver
19 properly required close of escrow documents as required by TILA
20 was and continues to be a pattern of practice routinely carried
21 out by defendants to defraud or to harm home loan borrowers.
22 These practices caused WMC's loan agreement with plaintiff to be
23 void.

24 15. On May 19, 1998, WMC notified plaintiff that it had not
25 received proof of her renewal of the fire insurance policy on
26 plaintiff's home. Despite plaintiff's numerous telephone calls
27 to WMC and despite verification provided to WMC by plaintiff's
28 insurance company that a copy of the insurance policy had been

1 mailed to WMC, WMC proceeded to force-place a substitute policy
2 from another fire insurance company at plaintiff's expense. On
3 October 13, 1998, plaintiff received a copy of the force-placed
4 policy, which reflected a premium of \$2,242, nearly three times
5 the annual premium for plaintiff's own policy of \$820, which
6 plaintiff had been regularly paying.

7 16. In January, 1999, after numerous telephone calls to WMC,
8 plaintiff received a letter dated January 19, 1999, advising her
9 that WMC had received recent confirmation of insurance coverage
10 for plaintiff's property and that WMC had canceled both the
11 force-placed insurance and its charge to plaintiff for that
12 policy.

13 17. Unbeknownst to plaintiff and contrary to its
14 representation, WMC failed to cancel the \$2,242 charge to
15 plaintiff's account and in fact continued to impose an annual
16 charge on plaintiff's account for this insurance without
17 notifying plaintiff.

18 18. On August 19, 1999, WMC served on plaintiff a ten-day
19 default notice listing amounts alleged due on the mortgage. The
20 amounts set forth in the default notice were false. They
21 exceeded the amounts due under the note by a substantial sum.
22 Using these excessive amounts as a pretext, on November 5, 1999,
23 WMC and its agent Millennium Foreclosure Services, LLC
24 ("Millennium"), served plaintiff with a notice of default, in the
25 amount of \$42,114.79.

26 19. On December 4, 1999, plaintiff sent a detailed letter to
27 both WMC and Millennium by facsimile. In her letter, which is
28 "qualified written request" within the meaning of RESPA at

1 subsection (e) of 12 U.S.C. §2605, plaintiff denied that she owed
2 WMC the amount shown in Millennium's notice of default and she
3 renewed her previous oral requests to WMC, starting in June,
4 1999, for an accurate accounting, as WMC's monthly payment coupon
5 sent to plaintiff contained erroneous accounting debits and
6 credits.

7 20. Subsection (e) of 12 U.S.C. §2605 of RESPA requires a
8 loan servicer to acknowledge receipt of a "qualified written
9 request" within 20 days and to respond to such a request within
10 60 days, excluding legal public holidays, Saturdays, and Sundays.

11 21. From June, 1999, until March 1, 2002, WMC violated RESPA
12 by failing to respond to plaintiff's oral requests and also by
13 failing to acknowledge or to respond within the statutory limits
14 to plaintiff's "qualified written requests." Not only did
15 defendants fail to respond to plaintiff's oral and written
16 requests, they continued to bill plaintiff for improper charges,
17 and they also attempted to carry out a foreclosure sale of
18 plaintiff's home based upon these improper charges. Plaintiff
19 further alleges that defendants' failure to deliver required
20 right to rescind notices and to prepare and process properly
21 other required close of escrow documents as required by TILA was
22 and continues to be a pattern of practice routinely carried out
23 by defendants to defraud or to harm home loan borrowers.

24 22. From the inception of this loan in June 1997 until
25 December 2003, WMC failed to produce documents that plaintiff had
26 been requesting for nearly a year pursuant to written discovery.
27 When they were finally produced, these documents showed that the
28 Fairbanks defendants subsequently became the servicer for

1 plaintiff's loan. Unbeknownst to plaintiff, WMC failed to
2 disclose that this loan servicing had been transferred to the
3 Fairbanks defendants.

4 23. On February 11, 2000 plaintiff received from Millennium
5 a Notice of Trustee's Sale recorded on February 7, 2000, citing a
6 sale date of March 2, 2000. The sale amount listed in the Notice
7 was \$372,316.39.

8 24. On February 27, 2000, plaintiff sent via facsimile to
9 WMC a copy of a telegram advising WMC that it had failed to
10 respond to plaintiff's previous letters, had failed to provide an
11 accurate accounting, and had violated various laws and
12 regulations.

13 25. On March 1, 2000, WMC supplied plaintiff with a
14 statement purportedly showing the history of payments on the
15 loan, but this statement was incomprehensible, as were WMC's
16 monthly loan statements.

17 26. On March 2, 2000, plaintiff notified WMC that she had
18 filed a Chapter 13 bankruptcy petition, and she verified that the
19 foreclosure had been canceled. On April 11, 2000, in violation
20 of the automatic bankruptcy stay, WMC filed a Notice of Trustee's
21 Sale scheduled for May 10, 2000.

22 27. This mortgage loan transaction with WMC was a consumer
23 credit transaction entered into by plaintiff for personal,
24 household or family purposes.

25 28. Plaintiff is informed and believes, and based thereon
26 alleges that the acts and the conduct of the defendants alleged
27 herein above are a violation of Civil Code § 1770, the Consumers
28 Legal Remedies Act ("CLRA"), including subsections (a)(8), (9),

1 (13), (14), (16) and (19), respectively.

2 29. Plaintiff has suffered substantial economic damage, and
3 other general and special damages, as a result of the herein-
4 mentioned violations of the Consumers Legal Remedies Act, in an
5 amount to be proven at time of trial.

6 30. Plaintiff is informed and believes, and based thereon
7 alleges, that defendants continue to engage in the above-
8 described deceptive practices, and that unless they be enjoined
9 from doing so by this court they will continue to do so, all to
10 the damage of its customers who will enter into home loan
11 mortgage transactions with the defendants.

12 31. The aforementioned violations of the Civil Code by
13 defendants were willful, despicable, cruel unjust, malicious,
14 fraudulent or oppressive, or were committed in conscious
15 disregard of the consequences to the plaintiff and other
16 consumers, thereby entitling plaintiff to punitive damages
17 pursuant to Civil Code §3294 and other California and federal
18 statutes.

19

20 FIRST CAUSE OF ACTION

21 (Unlawful predatory lending practices)

22 32. Plaintiff realleges and incorporates herein by reference
23 the allegations set forth in Paragraphs 1 through 31 above as if
24 fully alleged herein.

25 33. Defendant WMC has consistently engaged in what is called
26 predatory lending practices, that is, it preys upon borrowers who
27 have poor credit history or who have limited financial resources
28 or who are elderly. In doing so, WMC takes advantage of these

1 vulnerable borrowers by demanding that such borrowers, including,
2 for example, plaintiff, pay excessively high interest rates and
3 other excessive or unnecessary lending charges which are not
4 warranted by the particular circumstances of such borrowers. In
5 addition, defendant WMC engaged in pervasive and egregious
6 account practices, which, combined with its failure to respond to
7 "qualified written requests," enabled WMC to act within impunity
8 on a scale heretofore not recognized in California lending
9 practices.

10 34. These predatory lending practices are consistently
11 followed by WMC and constitute an unfair business practice under
12 what is called §17200 of the California Business & Professions
13 Code.

14 35. Wherefore, plaintiff, on behalf of herself and also on
15 behalf of the people of the State of California, seeks whatever
16 appropriate remedies would be available under §17200, including
17 without limitation statutory penalties, restitution, disgorgement
18 of profits, injunctive relief, and attorney's fees, and to bar
19 WMC from conducting business in the California home loan market.

20

21

SECOND CAUSE OF ACTION

22

(Consumer Legal Remedies Act)

23

24

25

26

27

28

36. Plaintiff realleges and incorporates herein by reference
the allegations set forth in Paragraphs 1 through 35 above as if
fully alleged herein.

37. Plaintiff is informed and believes, and thereon alleges,
that the acts and conduct of WMC as alleged in this complaint
violate various provisions of what is called the California

1 Consumers Legal Remedies Act, which is set forth in Civil Code
2 \$1750, et. seq.

3 38. As a proximate result of said violations, plaintiff has
4 suffered substantial economic damages and other general and
5 special damages in an amount to be proven at time of trial.

6 39. Wherefore, plaintiff seeks whatever appropriate remedies
7 would be available under \$1750, including without limitation
8 damages, statutory penalties, restitution, injunctive relief, and
9 attorney's fees.

10
11 THIRD CAUSE OF ACTION

12 (Truth in Lending Act)

13 40. Plaintiff realleges and incorporates herein by reference
14 the allegations set forth in Paragraphs 1 through 39 above as if
15 fully alleged herein.

16 41. Plaintiff is informed and believes, and thereon alleges,
17 that the acts and conduct of defendants as alleged in this
18 complaint violate various provisions of what is called the Truth
19 in Lending Act, 15 U.S.C. \$1601 et. seq. ("TILA"), Regulation Z,
20 and what is called the Home Ownership and Equity Protection Act,
21 15 U.S.C \$1639 ("HOEPA").

22 42. These violations include, without limitation, the
23 failure to provide to plaintiff the mandated written three-day
24 right to cancel notice prior to the presumed consummation date of
25 June 11, 1997. In addition, they failed to provide accurate
26 disclosures, as mandated by these statutes.

27 43. As a proximate result of said TILA, Regulation Z, and
28 HOEPA violations, plaintiff has suffered substantial economic

1 damages and other general and special damages in an amount to be
2 proven at time of trial, and she is entitled to rescission of her
3 loan transaction with WMC.

4 44. Wherefore, plaintiff seeks damages and whatever other
5 remedies are available under TILA, Regulation Z, and HOEPA,
6 including without limitation rescission of her loan transaction
7 with WMC.

8
9 FOURTH CAUSE OF ACTION

10 (Real Estate Settlement Procedures Act)

11 45. Plaintiff realleges and incorporates herein by reference
12 the allegations set forth in Paragraphs 1 through 44 above as if
13 fully alleged herein.

14 46. Plaintiff is informed and believes, and thereon alleges,
15 that the acts and conduct of defendants as alleged in this
16 complaint violate various provisions of what is called the Real
17 Estate Settlement Procedures Act, 12 U.S.C. §2601, et. seq.
18 ("RESPA").

19 47. These violations include without limitation kickbacks,
20 referral fees, unnecessary escrow accounts for taxes and
21 insurance, improper or inaccurate reporting to credit borrowers,
22 failure to disclose the transfer of the servicing, failure to
23 respond to a "qualified written request", failure to "receive
24 payments from a borrower" and "making the payments of principal
25 and interest as may be required pursuant to the terms of the
26 loan" and other home mortgage lending practices that tend to
27 cause excessive borrowing costs for home loans.

28 48. As a proximate result of said RESPA violations,

1 plaintiff has suffered substantial economic damages and other
2 general and special damages in an amount to be proven at time of
3 trial, and she is entitled to rescission of her loan transaction
4 with WMC.

5 49. Wherefore, plaintiff seeks damages and whatever other
6 remedies are available under RESPA.

7

8

FIFTH CAUSE OF ACTION

9

(Debt Collection Violations)

10 50. Plaintiff realleges and incorporates herein by
11 reference the allegations set forth in Paragraphs 1 through 49
12 above as if fully alleged herein.

13 51. Plaintiff is informed and believes, and thereon alleges,
14 that the acts and conduct of defendants as alleged in this
15 complaint violate various provisions of what is called the
16 Federal Fair Debt Collections Practices Act, 15 U.S.C. §1692 et.
17 seq., including, for example, improper or inaccurate reports to
18 credit borrowers. In addition, it is a violation of Real Estate
19 Settlement Procedures Act, 12 U.S.C. §2605(3)(d), i.e.,
20 protection of credit rating. Servicer may not provide information
21 regarding any overdue payment to any consumer reporting agency.

22 52. As a proximate result of said violations, plaintiff has
23 suffered substantial economic damages and emotional distress and
24 other general and special damages in an amount to be proven at
25 time of trial.

26 53. Wherefore, plaintiff seeks whatever remedies may be
27 available under this federal debt collections statute, including
28 without limitation compensatory damages, statutory damages,

1 statutory penalties and attorney's fees.

2

3

SIXTH CAUSE OF ACTION

4

(Lending Fraud)

5

6 54. Plaintiff realleges and incorporates herein by reference
7 the allegations set forth in Paragraphs 1 through 53 above as if
8 fully alleged herein.

8

9 55. At the time WMC made to plaintiff the home loan which is
10 the subject of this complaint, WMC made various representations
11 to plaintiff, including without limitation that WMC would service
12 plaintiff's loan honestly and fairly and accurately, using
13 accurate accounting procedures, and would send to plaintiff
14 accurate statements regarding loan payments, loan balances,
15 escrow charges, and other loan charges stated in connection with
16 WMC's loan to plaintiff.

16

17 56. Said representations were false. In truth, as part of
18 its predatory lending practices WMC intended to misstate the
19 amounts due under its loan to plaintiff in order to obtain
20 greater compensation under the loan than was permitted either by
21 the loan contract or by the various statutory consumer
22 protections that have been enacted to prevent predatory lending
23 practices.

23

24 57. Plaintiff relied upon the representations of WMC, as
25 alleged above, and plaintiff's reliance was reasonable in view of
26 the fact that at the time of this loan she was led to believe by
27 WMC that WMC was a highly ethical and honest home loan lender.

27

28 58. As a proximate result of said lending fraud, plaintiff
has suffered substantial economic damages and other general and

1 special damages in an amount to be proven at time of trial, and
2 she is entitled to rescission of her loan transaction with WMC.

3 59. Wherefore, plaintiff seeks both economic and non-
4 economic damages in such amounts as may be allowed at time of
5 trial.

6
7 SEVENTH CAUSE OF ACTION

8 (Breach of Contract)

9 60. Plaintiff realleges and incorporates herein by reference
10 the allegations set forth in Paragraphs 1 through 59 above as if
11 fully alleged herein.

12 61. On or about June 1997, plaintiff entered into a written
13 contract with defendant WMC whereby WMC agreed to loan plaintiff
14 the sum of \$322,500 secured by a mortgage recorded against
15 plaintiff's home in Marin County, California. In that home loan
16 agreement, WMC promised, inter alia, that so long as plaintiff
17 timely made monthly payments, plaintiff would have thirty years
18 in which to repay all sums due under the loan.

19 62. WMC breached this home loan agreement by declaring the
20 loan in default, by demanding that plaintiff pay charges that
21 were not due under the loan, and by attempting to exercise
22 foreclosure rights given to WMC in the mortgage securing loan,
23 even though WMC did not have the right to exercise such
24 foreclosure rights.

25 63. As a proximate result of WMC's breach of this home loan
26 agreement as alleged above, plaintiff has sustained compensatory
27 damages in an amount to be determined at time of trial,
28 including, without limitation, damages she sustained when she was

1 forced to seek bankruptcy court protection.

2 64. Wherefore, plaintiff seeks compensatory damages in such
3 amounts as may be allowed by the court at time of trial.

4
5 EIGHTH CAUSE OF ACTION

6 (Elder Abuse)

7 65. Plaintiff realleges and incorporates herein by reference
8 the allegations set forth in Paragraphs 1 through 59 above as if
9 fully alleged herein.

10 66. The acts and practices of defendants as alleged in this
11 complaint constitutes what is called under California law elder
12 abuse as that term is used in Welfare & Institutions Code §15600
13 et. seq.

14 67. Elder abuse occurred in the present case because
15 plaintiff is a person 65 years of age or older residing in
16 California; defendants engaged in conduct which resulted in
17 plaintiff being subjected to financial abuse; and as a proximate
18 result of the conduct of defendants, plaintiff sustained injury,
19 damage, loss or harm to plaintiff's home in Marin County,
20 California.

21 68. Wherefore, as a proximate result of said elder abuse,
22 plaintiff seeks economic and non-economic damages in such amounts
23 as such may be allowed at time of trial.

24
25 NINTH CAUSE OF ACTION

26 (Usury Damages)

27 69. Plaintiff realleges and incorporates herein by reference
28 the allegations set forth in Paragraphs 1 through 68 above as if

1 fully alleged herein.

2 70. The interest rate charged by defendants for the WMC loan
3 which is the subject of this complaint was usurious as that term
4 is defined and applied by the California Constitution.

5 71. Wherefore, plaintiff is entitled to such damages as the
6 usury laws of California may allow.

7
8 TENTH CAUSE OF ACTION

9 (Rescission)

10 72. Plaintiff realleges and incorporates herein by reference
11 the allegations set forth in Paragraphs 1 through 71 above as if
12 fully alleged herein.

13 73. At the time defendant WMC made to plaintiff the home
14 loan which is the subject of this complaint, defendant WMC made
15 various representations to plaintiff, including without
16 limitation that defendant WMC would service plaintiff's loan
17 honestly and fairly and accurately, using accurate accounting
18 procedures, and would send to plaintiff accurate statements
19 regarding loan payments, loan balances, escrow charges, and other
20 loan charges stated in connection with defendant WMC's loan to
21 plaintiff.

22 74. Said representations were false. In truth, as part of
23 its predatory lending practices defendant WMC intended to
24 misstate the amounts due under its loan to plaintiff in order to
25 obtain greater compensation under the loan than was permitted
26 either by the loan contract or by the various statutory consumer
27 protections that have been enacted to prevent predatory lending
28 practices.

76. As a proximate result of said misrepresentations, plaintiff has suffered substantial economic damages and emotional distress and other general and special damages in an amount to be proven at time of trial.

77. Wherefore, plaintiff seeks rescission of her loan transaction with WMC Mortgage, including without limitation cancellation of the loan and the rescission of the loan contract and rescission of any other documents related to or made a part of the loan contract, and she also seeks restitution of all monies she has paid to WMC which under California or federal law WMC was not entitled to receive.

19 78. Plaintiff realleges and incorporates herein by reference
20 the allegations set forth in paragraphs 1 through 70 above as if
21 fully alleged herein.

79. As a proximate result of the statutory violations and the fraud and the usury violations and the elder abuse alleged in this complaint, plaintiff is entitled to an award of punitive damages pursuant to the provisions of Civil Code §3294.

28 a. Plaintiff seeks both economic and non-economic

1 compensatory damages to the extent allowed by any of the causes
2 of action alleged in this complaint.

3 b. Plaintiff seeks statutory penalties to the extent allowed
4 by any of the causes of action alleged in this complaint.

5 c. Plaintiff seeks rescission and restitution and
6 disgorgement to the extent allowed by any of the causes of action
7 alleged in this complaint.

8 d. Plaintiff seeks elder abuse and usury damages to the
9 extent allowed by any of the causes of action alleged in this
10 complaint.

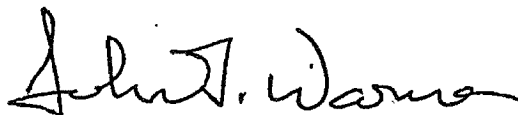
11 e. Plaintiff seeks punitive damages to the extent allowed by
12 any of the causes of action alleged in this complaint.

13 f. Plaintiff seeks attorney's fees to the extent allowed by
14 any of the causes of action alleged in this complaint.

15 g. Plaintiff seeks costs of suit to the extent allowed by
16 any of the causes of action alleged in this complaint.

17 h. Plaintiff seeks such other and further relief that the
18 court may allow.

19
20
21 July 22, 2004



John G. Warner
Attorney for Plaintiff
Patricia C. Barbera

EXHIBIT B

COPY

1 MICHAEL J. AGOGLIA (CA SBN 154810)
STEPHEN E. PAFFRATH (CA SBN 195932)
2 MORRISON & FOERSTER LLP
425 Market Street
3 San Francisco, California 94105-2482
Telephone: (415) 268-7000
4 Facsimile: (415) 268-7522
5 Attorneys for Defendant
WMC MORTGAGE CORP.; WMC FINANCE CO.; APOLLO
6 MANAGEMENT L.P.; WMCDIRECT; AND GE CONSUMER
FINANCE

ORIGINAL
FILED

SEP - 3 2004

RECEIVED
NORTHERN DISTRICT OF CALIFORNIA

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

12 Patricia C. Barbera,
13 Plaintiff,

Case No.

C 04 3738

EMC

14 v.

15 WMC Mortgage Corp., a California Corporation;
WMC Finance Co.; Apollo Management L.P.;
16 WMCDirect; GE Consumer Finance, a unit of
General Electric Company; Fairbanks Capital
17 Corp., a Utah Corporation; Fairbanks Capital
Holding Corp., a Delaware Corporation;
18 California Land Title Company of Marin, a
California business entity; Does 1 through 100,
19 inclusive.,

NOTICE OF REMOVAL OF
ACTION PURSUANT TO
28 U.S.C. § 1441 (B) AND (C)

(FEDERAL QUESTION
JURISDICTION)

20 Defendants.

22 TO THE CLERK OF THE UNITED STATES DISTRICT COURT AND PLAINTIFF:

23 PLEASE TAKE NOTICE that defendants WMC Mortgage Corp., WMC Finance Co.,
24 Apollo Management L.P., WMCDirect, and GE Consumer Finance (collectively the "Removing
25 Defendants") hereby remove to this Court the state court action described below.

26 1. On July 23, 2004, an action was commenced in the Superior Court of the State of
27 California in and for the County of San Francisco, entitled *Barbera v. WMC Mortgage Corp., et*

28

NOTICE OF REMOVAL

1

EXHIBIT B PAGE 23

1 *al.*, Case No. CGC-04-433269. A copy of the complaint in that action (the "Complaint") is
2 attached hereto as Exhibit A.

3 2. Defendant WMC Finance Co. received a copy of the Summons and Complaint by
4 mail on August 6, 2004. A copy of the Notice of Service of Process is attached hereto as
5 Exhibit B. None of the other Removing Defendants received a copy of the Complaint prior to
6 August 4, 2004.

7 3. This Notice of Removal is timely filed as required by 28 U.S.C. § 1446(b) since it
8 is filed within thirty days after service on the defendants of a copy of the Summons and the
9 Complaint commencing the action.

10 4. Plaintiff served defendant California Land Title Company of Marin ("California
11 Land Title") with the Complaint and Summons on August 12, 2004. California Land Title has
12 informed the Removing Defendants that it consents to the removal of the action to this Court. A
13 copy of California Land Title's consent to removal is attached hereto as Exhibit C.

14 5. The official docket in the state court proceeding does not reflect as of this date that
15 either defendant Fairbanks Capital Corp. or defendant Fairbanks Capital Holding Corp were
16 served with the Summons and Complaint. A copy of the state court docket is attached hereto as
17 Exhibit D.

18 6. The Complaint purports to state claims against defendants, *inter alia*, for alleged
19 violations of the Truth in Lending Act, 15 U.S.C. § 1601, *et seq.* ("TILA"), the Home Ownership
20 and Equity Protection Act, 15 U.S.C. § 1639 ("HOEPA"), and the Real Estate Settlement
21 Procedures Act, 12 U.S.C. § 2601, *et seq.* ("RESPA").

22 7. Removal is therefore proper pursuant to 28 U.S.C. § 1441(b) and (c).

23 8. Defendants have taken no action in the state court proceeding, and no further
24 proceedings have occurred in this matter in the state court.

25 9. Promptly after the filing of this Notice of Removal, the Removing Defendants
26 shall give written notice to Plaintiff of the filing of this Notice and shall, pursuant to 28 U.S.C. §
27 446(d), file a copy of this Notice with the Clerk of the Superior Court of the State of California
28 for the County of San Francisco.

NOTICE OF REMOVAL

2

1 10. Pursuant to 28 U.S.C. § 1446(a), the Removing Defendants file this Notice of
2 Removal in this district and division in which the Action was filed. Under this Court's Local
3 Rules, the Action should be assigned to the San Francisco or the Oakland Division of the
4 Northern District of California because the cause of action allegedly arose in Marin County,
5 California. Local Rule 3-2(d).

6 11. The Removing Defendants are represented by the undersigned attorney who
7 certifies, pursuant to Rule 11 of the Federal Rules of Civil Procedure, that the foregoing is true
8 and correct.

9 Dated: September 3, 2004

MICHAEL J. AGOGLIA
MORRISON & FOERSTER LLP

By: 

Michael J. Agoglia

Attorneys for Defendant
WMC MORTGAGE CORP., WMC
FINANCE CO., APOLLO
MANAGEMENT L.P., WMCDIRECT,
AND GE CONSUMER FINANCE

sf-1772165

NOTICE OF REMOVAL

3

EXHIBIT B PAGE 25

EXHIBIT C

1 JOHN G. WARNER (CA SBN 046123)
Law Office of John G. Warner
2 21 Tamal Vista Blvd., Suite 196
Corte Madera, CA 94925
3 Telephone: (415) 924-2640
Facsimile: (415) 927-0608

4 Attorneys for Plaintiff
5 PATRICIA C. BARBERA

6
7
8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 OAKLAND DIVISION
11

12 Patricia C. Barbera,

13 Plaintiff,

14 v.

15 WMC Mortgage Corp., a California Corporation;
WMC Finance Co.; Apollo Management L.P.;
16 WMCDirect; GE Consumer Finance, a unit of
General Electric Company; Fairbanks Capital
17 Corp., a Utah Corporation; Fairbanks Capital
Holding Corp., a Delaware Corporation;
18 California Land Title Company of Marin, a
California business entity; Does 1 through 100,
19 inclusive.,

20 Defendants.
21
22
23
24
25
26
27
28

Case No. C 04-03738 SBA

**NOTICE OF VOLUNTARY
DISMISSAL AS TO CERTAIN
DEFENDANTS [Fed. R. Civ. Proc.
41(a)(1)]**

NOTICE OF VOLUNTARY DISMISSAL AS TO CERTAIN DEFENDANTS
CASE NO. C-04-3738-SBA
sf-1833409

1 PLEASE TAKE NOTICE that, pursuant to Federal Rule of Civil Procedure 41(a)(1),
2 plaintiff Patricia C. Barbera voluntarily dismisses all claims brought against Apollo Management
3 L.P. and GE Consumer Finance, a unit of General Electric Company, without prejudice.

4 Dated: December __, 2004

JOHN G. WARNER
LAW OFFICES OF JOHN G. WARNER

5
6
7 By: s/s

John G. Warner

8 Attorneys for Plaintiff
9 PATRICIA C. BARBERA
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

NOTICE OF VOLUNTARY DISMISSAL AS TO CERTAIN DEFENDANTS
CASE NO. C-04-3738-SBA
sf-1833409

EXHIBIT D

1 IN THE UNITED STATES DISTRICT COURT
 2 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 3
 4
 5
 6
 7

8 PATRICIA BARBERA,

No. C 04-3738 SBA

9 Plaintiff,

ORDER

10 v.

[Docket No. 111]

11 WMC MORTGAGE CORP., et al.,

12 Defendants.
 13

14 This matter is before the Court on Defendants' WMC Mortgage Corp., WMC Finance Co.,
 15 and WMC Direct (collectively "Defendants") motion to dismiss Plaintiff Patricia Barbera's
 16 ("Plaintiff") Second Amended Complaint ("SAC") for failure to state a claim upon which relief can
 17 be granted. Having read and considered the arguments presented by the parties in the papers
 18 submitted to the Court, the Court finds this matter appropriate for resolution without a hearing. The
 19 Court hereby GRANTS Defendants' motion to dismiss. Plaintiff's third, fourth and fifth claims are
 20 DISMISSED WITH PREJUDICE. The case is REMANDED to the Superior Court of the State of
 21 California in and for the County of San Francisco.

22 **BACKGROUND**

23 A. **Factual Background**¹

24 1. **The Parties**

25 Plaintiff is a 73-year old woman residing at all material times in the County of Marin,
 26 California.
 27

28 ¹ The following facts are taken from Plaintiff's SAC.

1 Defendant WMC Mortgage Corp. ("WMC") is an entity formed in part by Defendant Apollo
2 Management L.P. WMC is in the business of making subprime loans on residential property and
3 also acts as the administrator for those loans. Defendant WMCDirect, owned and operated by
4 WMC, is an online nationwide business services website for mortgage brokers. SAC ¶ 3. On June
5 14, 2004, Defendant GE Consumer Finance Co., the consumer lending unit of the General Electric
6 Company, purchased Defendant WMC Finance Co., including Defendants WMC and WMCDirect,
7 from affiliates of Apollo Management L.P. SAC ¶ 4.

8 2. Allegations

9 In June of 1997, Plaintiff was in a "desperate financial situation" and obtained a loan from
10 WMC for \$322,500. SAC ¶ 13. On June 12, 1997, Plaintiff executed the loan documents, at which
11 time "defendants failed to provide to Plaintiff two written notices of Plaintiff's right to rescind within
12 three days of closing, and defendants failed to prepare and deliver accurate disclosures that were
13 mandated" under the Truth in Lending Act, 15 U.S.C. section 1601 *et seq.* SAC ¶ 14.

14 On May 19, 1998, WMC notified Plaintiff that it had not received proof of her renewal of the
15 hazard insurance policy on Plaintiff's home. SAC ¶ 15. Despite numerous telephone calls from
16 Plaintiff to WMC, and verification provided to WMC by Plaintiff's insurance company that a copy
17 of Plaintiff's insurance policy had been mailed to WMC, WMC "force-place[d] a substitute policy
18 from another hazard insurance company at Plaintiff's expense." *Id.* This new policy had a premium
19 of \$2,242, nearly three times the annual premium of Plaintiff's policy. *Id.*

20 In January of 1999, Plaintiff received a letter from WMC stating that WMC had received
21 confirmation of Plaintiff's hazard insurance coverage and that WMC had cancelled both the force-
22 placed insurance and its charge to Plaintiff for that policy. *Id.* ¶ 16. However, WMC in fact did not
23 cancel the \$2,242 charge to Plaintiff's account and continued to impose an annual charge on
24 Plaintiff's account for this hazard insurance. *Id.* ¶ 17.

25 On August 19, 1999, WMC served on Plaintiff a ten-day default notice, listing the amount
26 alleged due on Plaintiff's mortgage, but, according to Plaintiff, the listed amounts due were false. *Id.*
27 ¶ 18. On November 5, 1999, using these excessive amounts as a pretext, WMC and its foreclosure
28

1 agent, Millennium Foreclosure Services, LLC ("Millennium")², served Plaintiff with a notice of
2 default in the amount of \$42,114.79. *Id.* On December 4, 1999, Plaintiff sent a detailed letter to
3 WMC and Millennium, which constituted a "qualified written request" within the meaning of Real
4 Estate Settlement Procedures Act ("RESPA") 12 U.S.C. section 2605(e), whereby she denied owing
5 the amount shown in the default notice and renewed her previous oral requests to WMC for an
6 accurate accounting. *Id.* ¶ 19. Plaintiff alleges WMC violated RESPA beginning in June of 1999
7 through March 1, 2002 by failing to respond to Plaintiff's oral requests for an accounting, and failing
8 to acknowledge or to respond within the statutory time limits to Plaintiff's "qualified written
9 request."³ *Id.* ¶ 21. Furthermore, WMC continued to bill Plaintiff for improper charges and began to
10 carry out a foreclosure sale of Plaintiff's home based upon these improper charges. *Id.*

11 On February 11, 2000, Plaintiff received from Millennium a Notice of Trustee's sale,
12 recorded on February 7, 2000 citing a sale date of March 2, 2000 in the amount of \$372,316.39. *Id.*
13 ¶ 23.

14 On February 27, 2000, Plaintiff sent via facsimile to WMC a copy of a telegram informing
15 WMC that it had failed to respond to Plaintiff's previous letters, had failed to provide an accurate
16 accounting, and had violated various laws and regulations. *Id.* ¶ 24. On March 1, 2000, WMC
17 supplied Plaintiff with a statement of history of payments on the loan, but Plaintiff contends the
18 statement was incomprehensible. *Id.* ¶ 25.

19 On March 2, 2000, Plaintiff notified WMC that she had filed a Chapter 13 bankruptcy
20 petition and verified that the foreclosure had been cancelled. *Id.* ¶ 26. On April 11, 2000, Plaintiff
21 asserts that, in violation of the automatic bankruptcy stay, WMC filed a Notice of Trustee's Sale
22
23
24

25 ² Millennium is not a party in this action.

26
27 ³ 12 U.S.C. section 2605(e) of RESPA states a loan servicer shall provide a written response
28 acknowledging receipt of the "qualified written request" within 20 days, and shall respond to such a
request within 60 days, excluding legal public holidays, Saturdays, and Sundays. *See* 12 U.S.C. §
2605(e); SAC ¶ 20.

1 scheduled for May 10, 2000. *Id.*⁴

2 **B. Procedural History**

3 Plaintiff filed the initial complaint in this case on July 23, 2004 in San Francisco Superior
4 Court against WMC, WMC Finance Co., Apollo Management L.P., WMCDirect, GE Consumer
5 Finance, Fairbanks Capital Corp., Fairbanks Capital Holding Corp., and California Land Title
6 Company of Marin ("Cal Land"). On September 3, 2004, the action was removed to this Court. On
7 January 7, 2005, after several stipulated extensions of time to respond to the complaint, Cal Land
8 filed an Answer to the Complaint.

9 On January 10, 2005, then defendants Fairbanks Capital Corporation and Fairbanks Capital
10 Holding Corporation (collectively "Fairbanks") filed a motion for summary judgment, in which they
11 claimed Plaintiff's suit was barred under the principles of res judicata and release because Plaintiff
12 was a member of a nationwide class action, which challenged the same conduct, and which was
13 subsequently settled. Because Plaintiff did not dispute that she was a member of the prior class
14

15 ⁴ Plaintiff alleges additional facts raised for the first time in her opposition to Defendants'
16 motion. Specifically, Plaintiff alleges: (1) Defendants "postdated receipt of payments, to make it appear
17 that they were delinquent and late charges are applied in addition to other obtuse designations" (Pl. Opp.
18 filed Oct. 11, 2005, ¶ 5); (2) Defendants "misapplied the extra which I included with my payments" (*Id.*
19 ¶ 7); (3) Defendants "had [Plaintiff's] bankruptcy stay lifted by use of false figures" (*Id.* ¶ 8); (4) "on
20 adjustable interest rate notices, [Defendants] failed to include: index used, index rate, interest rate,
21 (current and projected), and margin applied" (*Id.* ¶ 10); (5) Defendants harassed Plaintiff with automatic
22 message telephone calls (*Id.* ¶ 11); (6) Defendants refused to provide Plaintiff with information
23 concerning the amount due under her loan (*Id.* ¶ 12); (7) on February 24, 2000, Plaintiff's attorney
24 "faxed a factual protest and 'let's talk' letter" to Defendants regarding the February 11, 2000 Notice of
25 Trustee's Sale, to which there was no response (*Id.* ¶ 19); (8) on March 2, 2000 Plaintiff was informed
by her attorney that her attorney had spoken with a representative of Defendants who stated "the total
arrears is \$68,811.61, which includes an advance for homeowners insurance in the amount of \$7,411.04
and foreclosures fees of \$3,403.29" (*Id.* ¶ 21); (9) in May 2000 WMC "reported to the Credit Bureaus
that [Plaintiff] was delinquent in the amount of \$72,050" (*Id.* ¶ 26); (10) on December 15, 2000, Plaintiff
sent WMC "a one line notice of rescission taken verbatim from the unexecuted form which [she] had
received, 'I wish to cancel'" (*Id.* ¶ 29); (11) On January 5, 2001, Plaintiff received a letter dated January
2, 2001, from WMC Senior Vice President & General Counsel, Michael L. Mayer, which included an
executed Notice of Right to Cancel and informed Plaintiff that her cancellation notice was "invalid and
of no legal effect." (*Id.* ¶ 30).

26 None of the above facts are alleged in Plaintiff's SAC but are raised for the first time in her
27 opposition. "It is axiomatic that the complaint may not be amended by briefs in opposition to a motion
28 to dismiss." *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984). That Plaintiff
is proceeding *in pro per* does not render the rules of the Court inapplicable. *See King v. Atiyeh*, 814
F.2d 565, 567 (9th Cir. 1987) (Pro per litigants must follow the same procedural rules as represented
parties.) Consequently, the Court shall limit its review to those facts properly alleged in the SAC, and
not those newly raised in Plaintiff's opposition.

1 action against Fairbanks, which involved identical claims and ended in a final judgment on the
2 merits, by Order dated March 7, 2005, the Court granted Fairbanks' motion for summary judgment,
3 finding that Plaintiff's claims against Fairbanks were barred by the doctrines of res judicata and
4 release [docket no. 71.]

5 On March 15, 2005, Plaintiff filed a First Amended Complaint ("FAC"). The FAC included
6 additional allegations against Defendant WMC, an additional cause of action for an accounting
7 against WMC and Fairbanks, named Cal Land in the third cause of action for violations of, *inter*
8 *alia*, the Truth in Lending Act, and added two additional causes of action against Cal Land for
9 breach of fiduciary duty and negligence. On March 21, 2005, Fairbanks filed a motion for entry of
10 final judgment pursuant to Federal Rule of Civil Procedure 54. On April 12, 2005, Plaintiff filed an
11 opposition to Fairbanks' motion, and also filed a motion for leave to amend the FAC. In her request
12 for leave to amend the FAC, Plaintiff sought to add new allegations against Fairbanks and the other
13 defendants. On May 26, 2005, the Court denied Plaintiff's Motion for Leave to Amend the FAC,
14 struck those portions of the FAC that added allegations against Fairbanks and Cal Land, and granted
15 Fairbanks' motion for entry of final judgment [docket no. 96.] Plaintiff was ordered to file a Second
16 Amended Complaint that removed the stricken allegations.

17 On June 1, 2005, Plaintiff substituted herself as counsel in place of her previously retained
18 counsel [docket no. 97.]

19 Plaintiff filed the SAC on August 10, 2005 [docket no. 108.] On August 25, 2005,
20 Defendants filed the instant motion to dismiss. Defendants also filed a Request for Judicial Notice.⁵

21
22 ⁵ In Defendants' Request for Judicial Notice, Defendants request that the Court take judicial
23 notice of exhibits: (A) Plaintiff's complaint on file in state court, *Barbera v. WMC Mortgage. Corp.*,
24 San Francisco Superior Court Civil Action No. 322066, filed June 11, 2001; (B) this Court's Order dated
25 March 1, 2005, Granting Fairbanks' Motion for Summary Judgment; (C) this Court's Order dated May
26 26, 2005, Granting Fairbanks' Motion for Entry of Final Judgment; (D-E) Copies of Assembly Bill No.
27 292 (1970 Reg. Sess. (Jan. 21, 1970)) and Assembly Bill No. 292 (1970)) (as amended Aug. 7, 1970);
28 (F) Notice of Entry of Order Granting Defendant WMC's Motions *In Limine* Nos. 1, 2 & 4, Denying
WMC's Motion *In Limine* 3, and Denying Plaintiff's Motion for Leave to Amend, entered by Judge
Busch in Plaintiff's action in San Francisco Superior Court; (G) text of Proposition 2; and (H) California
Department of Real Estate website printout.

Federal Rule of Evidence 201 authorizes the court to judicially notice only those "adjudicative
facts" that are either "(1) generally known within the territorial jurisdiction of the trial court or (2)
capable of accurate and ready determination by sources whose accuracy cannot reasonably be

1 Plaintiff filed an opposition with this Court on October 11, 2005.⁶

2 **LEGAL STANDARD**

3 **A. Rule 12(b)(6)**

4 Under Federal Rule of Civil Procedure 12(b)(6), a motion to dismiss may be granted
5 if it appears beyond a doubt that the plaintiff "can prove no set of facts in support of his
6 claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). For

7
8 questioned." Fed. R. Evid. 201(b). "Adjudicative facts are usually those facts that are in issue in a particular case." *Korematsu v. United States*, 584 F. Supp. 1406, 1414 (N.D. Cal. 1984) (Patel, J.).

9 With regard to Exhibit A, Defendants do not make clear to this Court for what purpose they are
10 requesting this Court take judicial notice of Plaintiff's state court complaint. Defendants simply state
11 Plaintiff has filed, with and without counsel, several civil actions against WMC and the parties have
12 conducted considerable discovery since the first action was filed in June of 2001. Defs. Mot. 2:14-20.
13 The existence of Plaintiff's state court complaint does not concern any "facts in issue" in this case, nor
14 is it relevant to the instant motion to dismiss. Consequently, the request is DENIED as to Exhibit A.

15 As the March 1, 2005 and May 26, 2005 Orders are part of the Court's own docket in this matter,
16 a formal request for judicial notice is unnecessary.

17 Defendants cite to Exhibits D, E and F in support of their argument that Plaintiff's Consumer
18 Legal Remedies Act ("CLRA") claim must fail because credit transactions do not fall within CLRA's
19 purview. Defs. Mot 13:5-24. The CLRA is a California statute which was irrelevant to the Court's
20 analysis and disposition of Plaintiff's federal claims. Therefore, the request for judicial notice is
21 DENIED as to Exhibits D, E & F.

22 Finally, Defendant cites to Exhibits G & H in support of their argument that Plaintiff's claim of
23 usury must fail as California has exempted from the usury laws licensed real estate brokers by the State
24 of California, and, Defendants argue, WMC was a licensed real estate broker at the time the loan was
25 made. The usury cause of action is based on state law. Again, given the Court's focus upon Plaintiff's
26 federal claims, these exhibits are irrelevant. For these reasons, the request for judicial notice is DENIED
27 as to Exhibits G & H.

28
29 ⁶ Defendants contend Plaintiff served upon them a different version of her opposition brief than
30 the one she filed with this Court. Defendants attached the version of the opposition they received as
31 Exhibit A to the Declaration of Seta Arabian in Support of Defendants' Reply ("Arabian Decl.") In the
32 version filed with the Court on October 11, 2005, in the "Foreclosure-bankruptcy issues" section,
33 Plaintiff includes two new paragraphs that are not present in the copy faxed to the Defendants and
34 attached to the Arabian Decl. These new sections concern Plaintiff's research into WMC's past and
35 current litigation, and what Plaintiff believes to be the relevant California laws that have been violated
36 by the conduct of Defendants alleged in the SAC. Additionally, in the opposition filed with the Court
37 but not in the version faxed to Defendants, Plaintiff attached copies of: 1) an article entitled "Loans Cost
38 Minorities More" by David Olinger and Jeffrey A. Roberts, Denver Post Staff Writers, Feb. 27, 2001;
39 2) a transcript of the testimony of Professor Cathy Lesser Mansfield before the Committee on Banking
40 and Financial Services, United States House of Representatives, May 24, 2000, at the Rayburn House
41 Office Building; and 3) copies of statements received by Plaintiff from WMC and Select Portfolio
42 Servicing, Inc.

43 These additional paragraphs and material were the only differences between the briefs received
44 by Defendants and filed with the Court and were not germane to the Court's analysis of Defendants'
45 motion to dismiss as they did not address the substantive issues raised by Defendants' in their motion.
46 Consequently, for purposes of deciding this motion, the Court restricted its review to the opposition
47 served upon Defendants.

1 purposes of such a motion, the complaint is construed in a light most favorable to the
2 plaintiff and all properly pleaded factual allegations are taken as true. *Jenkins v.*
3 *McKeithen*, 395 U.S. 411, 421 (1969); *Everest and Jennings, Inc. v. American Motorists Ins.*
4 *Co.*, 23 F.3d 226, 228 (9th Cir. 1994). All reasonable inferences are to be drawn in favor of
5 the plaintiff. *Jacobson v. Hughes Aircraft*, 105 F.3d 1288, 1296 (9th Cir. 1997).

6 When a complaint is dismissed for failure to state a claim, "leave to amend should be
7 granted unless the court determines that the allegation of other facts consistent with the
8 challenged pleading could not possibly cure the deficiency." *Schreiber Distrib. Co. v.*
9 *Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986). The court should consider
10 factors such as "the presence or absence of undue delay, bad faith, dilatory motive, repeated
11 failure to cure deficiencies by previous amendments, undue prejudice to the opposing party
12 and futility of the proposed amendment." *Moore v. Kayport Package Express*, 885 F.2d
13 531, 538 (9th Cir. 1989). Of these factors, prejudice to the opposing party is the most
14 important. See *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990) (citing
15 *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330-31 (1971)). Leave to
16 amend is properly denied "where the amendment would be futile." *DeSoto Yellow Freight*
17 *Sys.*, 957 F.2d 655, 658 (9th Cir. 1992).

18 ANALYSIS

19 The SAC asserts the following federal claims against WMC: (1) violation of the
20 Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601 *et seq.*; (2) violation of the Real Estate
21 Settlement Procedures Act, 12 U.S.C. §§ 2601, *et seq.*; and (3) violation of the Fair Debt
22 Collection Practices Act, 15 U.S.C. §§ 1692 *et seq.* ("FDCA").

23 A. Plaintiff's First Federal Claim - Violation of the Truth In Lending Act

24 1. The Statutes

25 In her third cause of action Plaintiff alleges violation of the Truth in Lending Act
26
27
28

1 ("TILA"), HOEPA, and Regulation Z.⁷ SAC, ¶¶ 41-43. 15 U.S.C. § 1635(a), the provision
 2 of TILA upon which Plaintiff relies, states in full:

3 Disclosure of obligor's right to rescind. Except as otherwise provided in this
 4 section, in the case of any consumer credit transaction (including opening or
 5 increasing the credit limit for an open end credit plan) in which a security
 6 interest, including any such interest arising by operation of law, is or will be
 7 retained or acquired in any property which is used as the principal dwelling
 8 of the person to whom credit is extended, *the obligor shall have the right to*
 9 *rescind the transaction until midnight of the third business day following*
 10 *the consummation of the transaction or the delivery of the information and*
 11 *rescission forms required under this section together with a statement*
 12 *containing the material disclosures required under this subchapter*, [15
 13 U.S.C. §§ 1601 et seq.] whichever is later, by notifying the creditor, in
 14 accordance with regulations of the Board, of his intention to do so. The
 15 creditor shall clearly and conspicuously disclose, in accordance with
 16 regulations of the Board, to any obligor in a transaction subject to this section
 17 the rights of the obligor under this section. The creditor shall also provide, in
 18 accordance with regulations of the Board, appropriate forms for the obligor
 19 to exercise his right to rescind any transaction subject to this section.

20 15 U.S.C. § 1635(a) (emphasis added). 15 U.S.C. § 1639(a)(1), the provision of HOEPA
 21 upon which Plaintiff relies, states in relevant part:

22 Specific disclosures. In addition to other disclosures required under this
 23 subchapter [15 U.S.C. §§ 1601 et seq.], for each mortgage referred to in
 24 section 1602(aa) of this title, the creditor shall provide . . . disclosures in
 25 conspicuous type size . . .

26 15 U.S.C. § 1639(a)(1). Finally, Regulation Z requires a "business which offers or extends
 27 credit" to make certain disclosures:

28 Purpose. The purpose of this regulation is to promote the informed use of
 consumer credit by requiring disclosures about its terms and cost. The
 regulation also gives consumers the right to cancel certain credit transactions
 that involve a lien on a consumer's principal dwelling, regulates certain credit
 card practices, and provides a means for fair and timely resolution of credit
 billing disputes.

12 C.F.R. § 226.1(b) & (c).

2. Analysis

Plaintiff seeks both rescission of her loan and damages. 15 U.S.C. § 1640(e).

⁷ The acronym "HOEPA" stands for "Home Ownership and Equity Protection Act" of 1994. HOEPA, which took effect on October 1, 1995, provides special protections for consumers who obtain high-rate or high-fee loans secured by their principal dwellings by requiring creditors to provide certain material information at least three days before the loan is consummated, prohibiting the use of certain loan terms, and barring specified practices.

1 Plaintiff's right of rescission is governed by 15 U.S.C. § 1635(f). This section provides, in
2 relevant part:

3 An obligor's right of rescission shall expire three years after the date
4 of consummation of the transaction or upon the sale of the property,
5 whichever occurs first, notwithstanding the fact that the information
and forms required under this section or any other disclosures
required under this part have not been delivered to the obligor.

6 15 U.S.C. § 1635(f). Civil penalties under TILA and HOEPA are subject to a one-year
7 statute of limitations. Plaintiff's loan closed in June of 1997. Plaintiff filed suit in state
8 court on July 23, 2004, which was removed to this Court in September of 2004, over seven
9 years later. Consequently, both Plaintiff's claim for damages, as well as her right to rescind,
10 are time-barred by these sections.

11 Plaintiff's SAC conclusorily asserts "[a]ny statute of limitations applicable to these
12 violations has been tolled under the doctrine of what is called equitable tolling." SAC ¶ 42.⁸
13 Plaintiff's defense to the statute of limitations is unpersuasive. "The equitable tolling
14 doctrine has been applied by the Supreme Court in certain circumstances, [] but it has been
15 applied sparingly." *Scholar v. Pacific Bell*, 963 F.2d 264, 268 (9th Cir.1992) (citing *Irwin v.*
16 *Veterans Admin.*, 498 U.S. 89, 111 S.Ct. 453, 457-58, 112 L.Ed.2d 435 (1990)). "Courts
17 have been generally unforgiving, however, when a late filing is due to claimant's failure 'to
18 exercise due diligence in preserving his legal rights.'" *Id.* (citing *Irwin*, 111 S.Ct. at 458).
19 "Equitable tolling focuses primarily on the plaintiff's excusable ignorance of the limitations
20 period." *Lehman v. United States*, 154 F.3d 1010, 1016 (9th Cir. 1998).

21
22
23 ⁸ In her opposition she states 11 U.S.C. § 108 extends the statute of limitations for commencing
or continuing an action by the debtor. However, as Plaintiff concedes, that statute is available for
trustees suing to protect a bankruptcy estate. Plaintiff does not assert she is a trustee.

24 Additionally, Plaintiff argues that the force-placed insurance charge "could constitute a new
25 transaction which would require new disclosures and a new consummation date." Pl. Opp. Sec. IV ¶
6. Plaintiff does not indicate when that consummation date would have occurred, either the date of the
26 charge or the date Plaintiff discovered the charge on her account. Construing the facts in the most
favorable light to Plaintiff, the latest date for which she could allege the force-placed insurance charge
27 constituted a new transaction would be the date she learned of it, March 2, 2000. That was over four
years prior to the filing of the instant complaint in state court. Therefore, even if Plaintiff were able to
28 argue that imposition of the force-placed insurance charge constitutes a new transaction requiring new
disclosures and a new consummation date, she is nevertheless barred by the statute of limitations.

1 Here, Plaintiff's SAC fails to plead such facts. As a preliminary matter, the factual
2 predicate for her claim that WMC failed to provide her with certain documents should have
3 been known to her in 1997, well before July 2004. In her opposition, Plaintiff states that she
4 signed the "Notice of Right to Cancel" on June 12, 1997 and acknowledged, by her
5 signature, receipt of two copies of the this notice. Pl. Opp. ¶ 1. This acknowledgment is
6 evidence that Plaintiff received two copies of this notice, or, at a minimum, was aware that
7 she was entitled to two copies of this notice at the time of the loan closing. Plaintiff alleges
8 that she was not given any documents on June 12, 1997, contrary to her signed
9 acknowledgment, but concedes that when she did receive her copy of her loan documents on
10 June 19, 1997, she "put it away without inspecting it," and years passed before she inspected
11 what those documents contained. *Id.* Plaintiff's failure to inspect the documents, especially
12 in light of her signed acknowledgment, does not constitute "excusable ignorance of the
13 limitations period" justifying imposition of equitable tolling. Thus, this claim is barred by
14 the statute of limitations and is DISMISSED with prejudice.

15 **B. Plaintiff's Second Federal Claim - Violation of the Real Estate Settlement**
16 **Procedures Act**

17 In her fourth cause of action, Plaintiff alleges the following acts by WMC violated
18 the Real Estate Settlement Procedures Act ("RESPA"): "kickbacks, referral fees,
19 unnecessary escrow accounts for taxes and hazard insurance, improper or inaccurate
20 reporting to credit bureaus, failure to disclose the transfer of the servicing of Plaintiff's loan
21 account, failure to respond to acknowledge 'payments from a borrower' and to acknowledge
22 'making the payments of principal and interest as may be required pursuant to the terms of
23 the loan,' and other home mortgage lending practices that tend to cause excessive borrowing
24 costs for home loan borrowers." SAC ¶ 47. Plaintiff additionally alleges that WMC
25 violated RESPA "[b]eginning June 1999, through March 1, 2002" by failing to respond to
26 Plaintiff's oral requests and failing to acknowledge or respond to Plaintiff's qualified written
27 requests." SAC ¶ 21. Defendants respond that this claim is time barred.

28 The applicable statutes of limitations for claims brought pursuant to RESPA are

found in 12 U.S.C. section 2614. "Any action pursuant to the provisions of section 2605, 2607, or 2608 of this title may be brought in the United States district court within 3 years in the case of a violation of section 2605 of this title and 1 year in the case of a violation of section 2607 or 2608 of this title from the date of the occurrence of the violation." *See* 12 U.S.C. §2614.

1. Section 2607

Plaintiff's allegations of kickbacks and referral fees are covered under section 2607(a).⁹ By its terms, section 2607(a) prohibits the giving or receipt of fees or kickbacks "incident to or part of a real estate settlement service involving a federally related mortgage loan." *See* 12 U.S.C. § 2607(a). "Settlement services" is defined as any "service provided in connection with a real estate settlement." *See* 12 U.S.C. § 2602(3). No where in Plaintiff's SAC does she allege where, when, how or from whom WMC received kickbacks or referral fees. Rather it is a bald assertion unsupported by facts. The facts alleged by Plaintiff fail to demonstrate the inapplicability of the statute of limitations. Plaintiff received her mortgage loan in June of 1997. Section 2614 required her to bring her claim alleging kickbacks or referral fees within one year, by June of 1998. This claim is time barred and is therefore DISMISSED with prejudice.

2. Section 2605

The remaining RESPA allegations are subject to the 3-year statute of limitations as the conduct she alleges by WMC concerns "servicing of mortgage loans and administration of escrow accounts." *See* 12 U.S.C. § 2605.¹⁰

⁹ This provision states: "No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." 12 U.S.C. § 2607(a).

¹⁰ The other statute referenced in section 2614, section 2608, is inapplicable to this case. Section 2608 states: "No seller of property that will be purchased with the assistance of a federally related mortgage loan shall require directly or indirectly, as a condition to selling the property, that title insurance covering the property be purchased by the buyer from any particular title company." Plaintiff's complaint does not involve the sale of her home or allegations that she was required to

Plaintiff's allegations are inconsistent and insufficient to overcome the time bar for several reasons. First, the latest date for which Plaintiff alleges violative conduct on the part of WMC is April 11, 2000, over four years prior to the filing the instant complaint. Thus, her claims are time-barred. Second, Plaintiff's loan was transferred to another entity for servicing in July of 2000; Plaintiff does not explain, in her SAC or opposition, how WMC violated RESPA through March 1, 2002, *after* the loan had been transferred. Third, RESPA imposes obligations upon a party upon written requests, not oral. *See* 12 U.S.C. § 2605(e)(1)(B). The only qualified written request¹¹ Plaintiff asserts in her SAC occurred on December 4, 1999, more than three years prior to the filing of the instant complaint. Fourth, even assuming Plaintiff's delayed discovery of the transfer of her loan in September, 2003 was reasonable such that the doctrine of equitable tolling applied, Plaintiff learned of the transfer ten months prior to the filing of this suit. *See Santa Maria v. Pac. Bell*, 202 F.3d 1170, 1178 (9th Cir. 2000) ("[E]quitable tolling will serve to extend the statute of limitations for filing suit until the plaintiff can gather what information he needs.") Plaintiff does not provide any justification for the delay between her discovery of the transfer, and the filing of the instant complaint. Therefore, she has not proven she is entitled to invoke the doctrine of equitable tolling.

For all these reasons, this claim is DISMISSED with prejudice.

C. Plaintiff's Third Federal Claim - Violation of the Fair Debt Collection Practices Act

In her fifth cause of action, Plaintiff alleges WMC's acts and conduct violated the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.* SAC ¶ 51. Plaintiff generally alleges all of the acts and conduct by WMC violate the FDCPA,

purchase title insurance from a particular company.

¹¹ 12 U.S.C. 2605(e)(1)(B) states in relevant part: "For purposes of this subsection, a qualified written request shall be a written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, that (i) includes, or otherwise enables the servicer to identify, the name and account of the borrower; and (ii) includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower."

1 including "the improper or inaccurate reports to credit borrowers" by WMC.¹² *Id.* Here,
2 again, WMC responds that Plaintiff's claim is time-barred. Additionally, even if the claim
3 were not time-barred, WMC argues it is misplaced since the FDCPA only prohibits certain
4 activities of debt collectors, not creditors such as WMC.

5 1. Statute of Limitations

6 "An action to enforce any liability created by this subchapter may be brought in any
7 appropriate United States district court without regard to the amount in controversy, or in
8 any other court of competent jurisdiction, within one year from the date on which the
9 violation occurs." 15 U.S.C. § 1692k(d). As with her other allegations, Plaintiff merely
10 asserts that the violations giving rise to the claim "continue through the present time." SAC
11 ¶ 51. She does not offer any evidence of the nature of the acts of WMC which form the
12 basis of the assertion, nor when they occurred. Moreover, given WMC's transfer of the
13 servicing of Plaintiff's loan to another party in 2000, the Court is unaware of any facts
14 Plaintiff could allege that would fall within the year prior to her filing the instant complaint.

15 2. FDCPA Applies Only to "Debt Collectors"

16 Alternatively, WMC argues that even were this cause of action not time barred by
17 the statute of limitations, Plaintiff's claim still fails as the FDCPA is inapplicable to parties
18 collecting their own debt.

19 The FDCPA regulates debt collectors rather than creditors. *Thomas v. Law Firm of*
20 *Simpson & Cyback*, 392 F.3d 914, 916-17 (7th Cir. 2004). The term "debt collector" means
21 any person who "regularly collects or attempts to collect, directly or indirectly, debts owed
22 or due or asserted to be owed or due to *another*." 15 U.S.C. § 1692a(6) (emphasis added).
23 The term "creditor" means "any person who offers or extends credit creating a debt or to
24 whom a debt is owed" 15 U.S.C. 1692a(4). Furthermore, the FDCPA exempts from its

25 _____
26 ¹² Plaintiff references 12 U.S.C. § 2605(3)(d) with respect to her allegation of "improper or
27 inaccurate reports to credit borrowers." SAC ¶ 51. There is no 12 U.S.C. § 2605(3)(d). In this same
28 paragraph of the SAC, Plaintiff asserts a "loan servicer may not provide information regarding any
overdue payment to any consumer reporting agency." *Id.* The SAC does not allege when, to whom, nor
what information WMC provided to any consumer reporting agency regarding any overdue payments.
Thus the SAC is completely devoid of facts to support these allegations.

1 definition of debt collectors, "any officer or employee of a creditor while, *in the name of the*
2 *creditor*, collecting debts for such creditor." 15 U.S.C. § 1692a(6)(A) (emphasis added).
3 Because Plaintiff alleges activities by WMC regarding collection of payments owed to it
4 under the loan, i.e., it was WMC's debt it sought to recover from Plaintiff, WMC was not a
5 "debt collector" for purposes of the FDCPA. Thus, Plaintiff has no cognizable claim against
6 WMC on this ground.

7 For these reasons, this claim is DISMISSED with prejudice.

8 **D. Supplemental State Causes of Action**

9 When a case is properly removed on the basis of federal question jurisdiction, but
10 the federal claims are subsequently eliminated from the case, the district court retains the
11 discretion to remand the action to state court. *See Carnegie-Mellon Univ. v. Cahill*, 484
12 U.S. 343, 348 (9th Cir. 1991). In each case, and at every stage of the litigation, the federal
13 court must consider and weigh the values of judicial economy, convenience, fairness, and
14 comity in order to decide whether to exercise jurisdiction over a case involving pendent
15 state-law claims. *Id.* at 349. When the balance of the relevant factors indicates that a case
16 properly belongs in state court, such as when the federal claims have been resolved in the
17 early stages of the litigation, the district court may decline the exercise of jurisdiction and
18 remand the action to state court. *Id.* As the United States Supreme Court recognized in
19 *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966), the district court's jurisdiction
20 over state law claims "need not be exercised in every case in which it is found to exist
21 Needless decisions of state law should be avoided as a matter of comity[.]" *Id.*

22 Plaintiff's third, fourth and fifth claims are the only claims alleged over which the
23 Court has original jurisdiction. Those claims have been dismissed with prejudice.
24 Moreover, since this litigation is in its initial stage, the concerns of "economy, convenience,
25 fairness and comity" weigh in favor of declining to retain jurisdiction. *See Imagineering,*
26 *Inc. v. Kiewit Pacific Co.*, 976 F.2d 1303, 1309 (9th Cir. 1992), *cert. denied*, 507 U.S. 1004
27 (1993). Therefore, the Court exercises its discretion and declines to assert supplemental
28 jurisdiction over the remaining state law claims.

CONCLUSION

For the reasons stated above,

IT IS HEREBY ORDERED THAT Defendants' motion to dismiss is GRANTED.

Plaintiff's third, fourth and fifth claims are DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED THAT the case is REMANDED to the Superior Court of the State of California in and for the County of San Francisco. The clerk is directed to terminate any pending matters and to close the file.

IT IS SO ORDERED

IT IS SO ORDERED.



SAUNDRA BROWN ARMSTRONG
United States District Judge

Dated: 1/19/06

EXHIBIT E

1 MICHAEL J. AGOGLIA (BAR NO. 154810)
2 HEATHER A. MOSER (BAR NO. 212686)
3 SETA ARABIAN (BAR NO. 223178)
4 MORRISON & FOERSTER LLP
5 425 Market Street
6 San Francisco, California 94105-2482
7 Telephone: (415) 268-7000
8 Facsimile: (415) 268-7522
9 sarabian@mofo.com

10 Attorneys for Defendants
11 WMC MORTGAGE CORP., WMC FINANCE CO., and
12 WMCDIRECT

FILED
SUPERIOR COURT
COUNTY OF SAN FRANCISCO

APR 3 - 2006

GORDON PARK-LI, Clerk

BY: John Rodriguez
Deputy Clerk

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO
10 UNLIMITED CIVIL JURISDICTION
11

12 Patricia C. Barbera,

13 Plaintiff,

14 v.

15 WMC Mortgage Corp., a California Corporation;
16 WMC Finance Co.; Apollo Management L.P.;
17 WMCDirect; GE Consumer Finance, a unit of
18 General Electric Company; Fairbanks Capital
19 Corp., a Utah Corporation; Fairbanks Capital
20 Holding Corp., a Delaware Corporation;
21 California Land Title Company of Marin, a
22 California business entity; Does 1 through 100,
23 inclusive,

24 Defendants.
25
26
27
28

Case No. CGC-04-433269

CLASS ACTION

~~Proposed~~ JUDGMENT IN
FAVOR OF DEFENDANTS WMC
MORTGAGE CORP., WMC
FINANCE CO., AND
WMCDIRECT

Judge: The Honorable Peter J. Busch
Dept.: 2 Annex
Action Filed: July 23, 2004
Trial Date: None Set

~~Proposed~~ JUDGMENT IN FAVOR OF WMC

sf-2092749

EXHIBIT E PAGE 43

1 This matter having come on for hearing before the Court, the Honorable Peter J. Busch
2 presiding, on March 8, 2006, on defendants WMC Mortgage Corp., WMC Finance Co., and
3 WMCDirect's motion for judgment on the pleading as to plaintiff's Second Amended Complaint;
4 in light of the Honorable Sandra B. Armstrong's January 19, 2006 Order dismissing plaintiff's
5 federal causes of action with prejudice and this Court's March 8, 2006 Order dismissing
6 plaintiff's remanded state-law causes of action with prejudice (a true and correct copy of which is
7 attached hereto as Exhibit 1); and for good cause shown;

8 IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

9 That Judgment be entered in favor of defendants WMC Mortgage Corp., WMC Finance
10 Co., and WMCDirect and against plaintiff Patricia Barbera for defendants' costs and
11 disbursements incurred in this action amounting to the sum of \$ _____, pursuant to the Order
12 granting defendants' motion for judgment on the pleadings without leave to amend.

13
14 Dated: 4/3/06

Peter J. Busch
The Honorable Peter J. Busch

EXHIBIT 1

COPY

1 MICHAEL J. AGOGLIA (BAR NO. 154810)
2 HEATHER A. MOSER (BAR NO. 212686)
3 SETA ARABIAN (BAR NO. 223178)
4 MORRISON & FOERSTER LLP
5 425 Market Street
6 San Francisco, California 94105-2482
7 Telephone: (415) 268-7000
8 Facsimile: (415) 268-7522
9 sarabian@mofo.com

10 Attorneys for Defendants
11 WMC MORTGAGE CORP., WMC FINANCE CO., and
12 WMCDIRECT

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF SAN FRANCISCO
15 UNLIMITED CIVIL JURISDICTION

16 Patricia C. Barbera,

17 Plaintiff,

18 v.

19 WMC Mortgage Corp., a California Corporation;
20 WMC Finance Co.; Apollo Management L.P.;
21 WMCDirect; GE Consumer Finance, a unit of
22 General Electric Company; Fairbanks Capital
23 Corp., a Utah Corporation; Fairbanks Capital
24 Holding Corp., a Delaware Corporation;
25 California Land Title Company of Marin, a
26 California business entity; Does 1 through 100,
27 inclusive,

28 Defendants.

Case No. CGC-04-433269

CLASS ACTION

NOTICE OF ENTRY OF ORDER

Judge: The Honorable Peter J. Busch
Dept.: 2 Annex
Action Filed: July 23, 2004
Trial Date: None Set

29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
560
561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
590
591
592
593
594
595
596
597
598
599
600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624
625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
640
641
642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685
686
687
688
689
690
691
692
693
694
695
696
697
698
699
700
701
702
703
704
705
706
707
708
709
710
711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728
729
730
731
732
733
734
735
736
737
738
739
740
741
742
743
744
745
746
747
748
749
750
751
752
753
754
755
756
757
758
759
760
761
762
763
764
765
766
767
768
769
770
771
772
773
774
775
776
777
778
779
780
781
782
783
784
785
786
787
788
789
790
791
792
793
794
795
796
797
798
799
800
801
802
803
804
805
806
807
808
809
810
811
812
813
814
815
816
817
818
819
820
821
822
823
824
825
826
827
828
829
830
831
832
833
834
835
836
837
838
839
840
841
842
843
844
845
846
847
848
849
850
851
852
853
854
855
856
857
858
859
860
861
862
863
864
865
866
867
868
869
870
871
872
873
874
875
876
877
878
879
880
881
882
883
884
885
886
887
888
889
890
891
892
893
894
895
896
897
898
899
900
901
902
903
904
905
906
907
908
909
910
911
912
913
914
915
916
917
918
919
920
921
922
923
924
925
926
927
928
929
930
931
932
933
934
935
936
937
938
939
940
941
942
943
944
945
946
947
948
949
950
951
952
953
954
955
956
957
958
959
960
961
962
963
964
965
966
967
968
969
970
971
972
973
974
975
976
977
978
979
980
981
982
983
984
985
986
987
988
989
990
991
992
993
994
995
996
997
998
999
1000
1001
1002
1003
1004
1005
1006
1007
1008
1009
1010
1011
1012
1013
1014
1015
1016
1017
1018
1019
1020
1021
1022
1023
1024
1025
1026
1027
1028
1029
1030
1031
1032
1033
1034
1035
1036
1037
1038
1039
1040
1041
1042
1043
1044
1045
1046
1047
1048
1049
1050
1051
1052
1053
1054
1055
1056
1057
1058
1059
1060
1061
1062
1063
1064
1065
1066
1067
1068
1069
1070
1071
1072
1073
1074
1075
1076
1077
1078
1079
1080
1081
1082
1083
1084
1085
1086
1087
1088
1089
1090
1091
1092
1093
1094
1095
1096
1097
1098
1099
1100
1101
1102
1103
1104
1105
1106
1107
1108
1109
1110
1111
1112
1113
1114
1115
1116
1117
1118
1119
1120
1121
1122
1123
1124
1125
1126
1127
1128
1129
1130
1131
1132
1133
1134
1135
1136
1137
1138
1139
1140
1141
1142
1143
1144
1145
1146
1147
1148
1149
1150
1151
1152
1153
1154
1155
1156
1157
1158
1159
1160
1161
1162
1163
1164
1165
1166
1167
1168
1169
1170
1171
1172
1173
1174
1175
1176
1177
1178
1179
1180
1181
1182
1183
1184
1185
1186
1187
1188
1189
1190
1191
1192
1193
1194
1195
1196
1197
1198
1199
1200
1201
1202
1203
1204
1205
1206
1207
1208
1209
1210
1211
1212
1213
1214
1215
1216
1217
1218
1219
1220
1221
1222
1223
1224
1225
1226
1227
1228
1229
1230
1231
1232
1233
1234
1235
1236
1237
1238
1239
1240
1241
1242
1243
1244
1245
1246
1247
1248
1249
1250
1251
1252
1253
1254
1255
1256
1257
1258
1259
1260
1261
1262
1263
1264
1265
1266
1267
1268
1269
1270
1271
1272
1273
1274
1275
1276
1277
1278
1279
1280
1281
1282
1283
1284
1285
1286
1287
1288
1289
1290
1291
1292
1293
1294
1295
1296
1297
1298
1299
1300
1301
1302
1303
1304
1305
1306
1307
1308
1309
1310
1311
1312
1313
1314
1315
1316
1317
1318
1319
1320
1321
1322
1323
1324
1325
1326
1327
1328
1329
1330
1331
1332
1333
1334
1335
1336
1337
1338
1339
1340
1341
1342
1343
1344
1345
1346
1347
1348
1349
1350
1351
1352
1353
1354
1355
1356
1357
1358
1359
1360
1361
1362
1363
1364
1365
1366
1367
1368
1369
1370
1371
1372
1373
1374
1375
1376
1377
1378
1379
1380
1381
1382
1383
1384
1385
1386
1387
1388
1389
1390
1391
1392
1393
1394
1395
1396
1397
1398
1399
1400
1401
1402
1403
1404
1405
1406
1407
1408
1409
1410
1411
1412
1413
1414
1415
1416
1417
1418
1419
1420
1421
1422
1423
1424
1425
1426
1427
1428
1429
1430
1431
1432
1433
1434
1435
1436
1437
1438
1439
1440
1441
1442
1443
1444
1445
1446
1447
1448
1449
1450
1451
1452
1453
1454
1455
1456
1457
1458
1459
1460
1461
1462
1463
1464
1465
1466
1467
1468
1469
1470
1471
1472
1473
1474
1475
1476
1477
1478
1479
1480
1481
1482
1483
1484
1485
1486
1487
1488
1489
1490
1491
1492
1493
1494
1495
1496
1497
1498
1499
1500
1501
1502
1503
1504
1505
1506
1507
1508
1509
1510
1511
1512
1513
1514
1515
1516
1517
1518
1519
1520
1521
1522
1523
1524
1525
1526
1527
1528
1529
1530
1531
1532
1533
1534
1535
1536
1537
1538
1539
1540
1541
1542
1543
1544
1545
1546
1547
1548
1549
1550
1551
1552
1553
1554
1555
1556
1557
1558
1559
1560
1561
1562
1563
1564
1565
1566
1567
1568
1569
1570
1571
1572
1573
1574
1575
1576
1577
1578
1579
1580
1581
1582
1583
1584
1585
1586
1587
1588
1589
1590
1591
1592
1593
1594
1595
1596
1597
1598
1599
1600
1601
1602
1603
1604
1605
1606
1607
1608
1609
1610
1611
1612
1613
1614
1615
1616
1617
1618
1619
1620
1621
1622
1623
1624
1625
1626
1627
1628
1629
1630
1631
1632
1633
1634
1635
1636
1637
1638
1639
1640
1641
1642
1643
1644
1645
1646
1647
1648
1649
1650
1651
1652
1653
1654
1655
1656
1657
1658
1659
1660
1661
1662
1663
1664
1665
1666
1667
1668
1669
1670
1671
1672
1673
1674
1675
1676
1677
1678
1679
1680
1681
1682
1683
1684
1685
1686
1687
1688
1689
1690
1691
1692
1693
1694
1695
1696
1697
1698
1699
1700
1701
1702
1703
1704
1705
1706
1707
1708
1709
1710
1711
1712
1713
1714
1715
1716
1717
1718
1719
1720
1721
1722
1723
1724
1725
1726
1727
1728
1729
1730
1731
1732
1733
1734
1735
1736
1737
1738
1739
1740
1741
1742
1743
1744
1745
1746
1747
1748
1749
1750
1751
1752
1753
1754
1755
1756
1757
1758
1759
1760
1761
1762
1763
1764
1765
1766
1767
1768
1769
1770
1771
1772
1773
1774
1775
1776
1777
1778
1779
1780
1781
1782
1783
1784
1785
1786
1787
1788
1789
1790
1791
1792
1793
1794
1795
1796
1797
1798
1799
1800
1801
1802
1803
1804
1805
1806
1807
1808
1809
1810
1811
1812
1813
1814
1815
1816
1817
1818
1819
1820
1821
1822
1823
1824
1825
1826
1827
1828
1829
1830
1831
1832
1833
1834
1835
1836
1837
1838
1839
1840
1841
1842
1843
1844
1845
1846
1847
1848
1849
1850
1851
1852
1853
1854
1855
1856
1857
1858
1859
1860
1861
1862
1863
1864
1865
1866
1867
1868
1869
1870
1871
1872
1873
1874
1875
1876
1877
1878
1879
1880
1881
1882
1883
1884
1885
1886
1887
1888
1889
1890
1891
1892
1893
1894
1895
1896
1897
1898
1899
1900
1901
1902
1903
1904
1905
1906
1907
1908
1909
1910
1911
1912
1913
1914
1915
1916
1917
1918
1919
1920
1921
1922
1923
1924
1925
1926
1927
1928
1929
1930
1931
1932
1933
1934
1935
1936
1937
1938
1939
1940
1941
1942
1943
1944
1945
1946
1947
1948
1949
1950
1951
1952
1953
1954
1955
1956
1957
1958
1959
1960
1961
1962
1963
1964
1965
1966
1967
1968
1969
1970
1971
1972
1973
1974
1975
1976
1977
1978
1979
1980
1981
1982
1983
1984
1985
1986
1987
1988
1989
1990
1991
1992
1993
1994
1995
1996
1997
1998
1999
2000
2001
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011
2012
2013
2014
2015
2016
2017
2018
2019
2020
2021
2022
2023
2024
2025
2026
2027
2028
2029
2030
2031
2032
2033
2034
2035
2036
2037
2038
2039
2040
2041
2042
2043
2044
2045
2046
2047
2048
2049
2050
2051
2052
2053
2054
2055
2056
2057
2058
2059
2060
2061
2062
2063
2064
2065
2066
2067
2068
2069
2070
2071
2072
2073
2074
2075
2076
2077
2078
2079
2080
2081
2082
2083
2084
2085
2086
2087
2088
2089
2090
2091
2092
2093
2094
2095
2096
2097
2098
2099
2100
2101
2102
2103
2104
2105
2106
2107
2108
2109

1 PLEASE TAKE NOTICE that on March 8, 2006, the Court entered an Order granting
2 without leave to amend the motion for judgment on the pleadings of defendants WMC Mortgage
3 Corp., WMC Finance Co., and WMCDirect. A true and correct copy of the Order is attached
4 hereto as Exhibit A.

5
6 Dated: March 8, 2006

MICHAEL J. AGOGLIA
HEATHER A. MOSER
SETA ARABIAN
MORRISON & FOERSTER LLP

7
8
9 By: 
Seta Arabian

10 Attorneys for Defendants
11 WMC MORTGAGE CORP., WMC
12 FINANCE CO., and WMCDIRECT
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
NOTICE OF ENTRY OF ORDER

sf-2092727

EXHIBIT E PAGE 47

PROOF OF SERVICE BY MAIL

(CCP 1013a, 2015.5)

I am employed with the law firm of Morrison & Foerster LLP, whose address is 425 Market Street, San Francisco, California, 94105; I am not a party to the within cause; I am over the age of eighteen years and I am readily familiar with Morrison & Foerster's practice for collection and processing of correspondence for mailing with the United States Postal Service and know that in the ordinary course of Morrison & Foerster's business practice the document described below will be deposited with the United States Postal Service on the same date that it is placed at Morrison & Foerster with postage thereon fully prepaid for collection and mailing.

I further declare that on the date hereof I served a copy of:

NOTICE OF ENTRY OF ORDER

on the following by placing a true copy thereof enclosed in a sealed envelope addressed as follows for collection and mailing at Morrison & Foerster LLP, 425 Market Street, San Francisco, California, 94105, in accordance with Morrison & Foerster's ordinary business practices:

Maximilian J.B. Hopkins
7665 Redwood Blvd., Suite 200
Novato, CA 94945

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed at San Francisco, California, this 8th day of March, 2006.

Regina C. Archuleta-Rodriguez
(typed)

(signature)

PROOF OF SERVICE

sf-2083844

EXHIBIT A

1 MICHAEL J. AGOGLIA (BAR NO. 154810)
2 HEATHER A. MOSER (BAR NO. 212686)
3 SETA ARABIAN (BAR NO. 223178)
4 MORRISON & FOERSTER LLP
5 425 Market Street
San Francisco, California 94105-2482
Telephone: (415) 268-7000
Facsimile: (415) 268-7522
sarabian@mofo.com

6 Attorneys for Defendants
7 WMC MORTGAGE CORP., WMC FINANCE CO., and
WMCDIRECT

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO
10 UNLIMITED CIVIL JURISDICTION
11

12 Patricia C. Barbera,

13 Plaintiff,

14 v.

15 WMC Mortgage Corp., a California Corporation;
16 WMC Finance Co.; Apollo Management L.P.;
17 WMCDirect; GE Consumer Finance, a unit of
General Electric Company; Fairbanks Capital
18 Corp., a Utah Corporation; Fairbanks Capital
Holding Corp., a Delaware Corporation;
19 California Land Title Company of Marin, a
California business entity; Does 1 through 100,
inclusive,

20 Defendants.
21
22
23
24
25
26
27
28

ENDORSED FILED
SUPERIOR COURT
COUNTY OF SAN FRANCISCO

MAR 8 - 2006

GORDON PARK-LI, Clerk
BY: ANNA REDIGONDA
Deputy Clerk

Case No. CGC-04-433269

CLASS ACTION

~~[PROPOSED]~~ ORDER
GRANTING DEFENDANTS WMC
MORTGAGE CORP., WMC
FINANCE CO., AND
WMCDIRECT'S MOTION FOR
JUDGMENT ON THE
PLEADINGS

Date: March 8, 2006
Time: 8:30 a.m.
Judge: The Honorable Peter J.
Busch
Dept.: 2 Annex
Action Filed: July 23, 2004
Trial Date: None Set

FILED
MAR 8 2006
CLERK OF SUPERIOR COURT
COUNTY OF SAN FRANCISCO

mjs

~~[PROPOSED]~~ ORDER GRANTING DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

sf-2078169

EXHIBIT E PAGE 50

1. Defendants WMC Mortgage Corp., WMC Finance Co., and WMCDirect's (collectively,
 2. "WMC") Motion for Judgment on the Pleadings as plaintiff Patricia Barbera's Second Amended
 3. Complaint came on for hearing before this Court. After careful consideration of the briefs and
 4. arguments of counsel, and all other matters presented to the Court, WMC's Motion for Judgment
 5. on the Pleadings is hereby GRANTED without leave to amend, and all claims in the Second
 6. Amended Complaint are dismissed with prejudice, on the following grounds.

7. 1. Plaintiff's claim under California Business & Professions Code section 17200
 8. ("UCL") fails under the four-year statute of limitations set forth at California Business &
 9. Professions Code section 17208. Plaintiff does not allege any conduct within four years before
 10. the filing of her action. Moreover, plaintiff could not allege any facts that WMC engaged in
 11. "predatory lending practices" at any time after July 2000, when Fairbanks took over servicing of
 12. plaintiff's loan.

13. 2. Plaintiff's claim under the Consumer Legal Remedies Act ("CLRA") is barred by
 14. the three-year statute of limitations set forth at California Civil Code section 1783. The latest
 15. conduct plaintiff refers to in her CLRA claim are incidents that took place in April 2000, over
 16. three years before plaintiff filed her complaint. Plaintiff's conclusory assertion that the CLRA
 17. "violations began when the loan was placed in June 1997 [sic] and they continue through the
 18. present time" does not save her claim from being time-barred. Plaintiff's CLRA claim also fails
 19. because the conduct alleged to violate the CLRA does not fall within the CLRA's scope. The
 20. Legislature chose to delete "credit" from the purview of the CLRA. *See* Assembly Bill No. 292
 21. (1970 Reg. Sess. (Jan. 21, 1970)), Assembly Bill No. 292 (1970 Reg. Sess. (Jan. 21, 1970) (as
 22. amended Aug. 7, 1970)); *see also* William L. Stern, *Bus. & Prof. C. § 17200 Practice* § 10:23
 23. (The Rutter Guide 2004) (noting legislative history of CLRA supports argument that "extensions
 24. of credit" not covered by the CLRA). Accordingly, the CLRA is inapplicable here because
 25. WMC's residential mortgage loan at issue was admittedly an extension of credit.

26. 3. Plaintiff's wrongful concealment claim is subject to a three-year statute of
 27. limitations under California Civil Procedure Code section 338(d). This claim is time-barred
 28. because it is based on an alleged misrepresentation at the time the loan was made in June 1997,

1 more than seven years before plaintiff filed her complaint. Her allegation that the doctrine of
 2 delayed discovery applies to her wrongful concealment claim fails because she does not plead any
 3 supporting facts and because her conclusory allegation is inconsistent with the allegations on
 4 which her wrongful concealment claim is based. Plaintiff's wrongful concealment claim also
 5 fails because it does not meet the particularity pleading requirements for fraud. *Lazar v. Super.*
 6 *Ct.*, 12 Cal. 4th 631, 645 (1996); *Stansfield v. Starkey*, 220 Cal. App. 3d 59, 73 (1990). Plaintiff
 7 fails to identify the content of the alleged "implied" misrepresentations, who made them, where
 8 or when they were made, or facts indicating why they were false when made.

9 4. Plaintiff's breach of contract claim is barred by the four-year statute of limitations
 10 period set forth at California Code of Civil Procedure section 337. The alleged conduct relating
 11 to her breach of contract claim occurred on or before April 11, 2000, more than four years before
 12 she filed her complaint. Her conclusory allegation that WMC breached the home loan agreement
 13 "[w]ithin four years of the filing of this complaint" does not save her claim from dismissal under
 14 the statute of limitations.

15 5. Plaintiff's usury claim is barred by the four-year statute of limitations found in the
 16 catch-all provision in California Code of Civil Procedure section 343. Because plaintiff's usury
 17 claim is based on the interest rate on the WMC loan she obtained in June 1997 — a rate
 18 undoubtedly known to her over seven years before she filed the complaint on July 23, 2004 — the
 19 four-year statute of limitations expired at the time the loan was made. Plaintiff's usury claim also
 20 fails because WMC is exempt from California usury provisions. The California Constitution
 21 permits an exemption from usury restrictions for "any loans made or arranged by any person
 22 licensed as a real estate broker by the State of California and secured in whole or in part by liens
 23 on real property." Cal. Const. art. XV, § 1. The exemption applies to WMC because at the time
 24 of plaintiff's loan, WMC was licensed as a real estate broker by the State of California and the
 25 loan was secured by a lien on plaintiff's home.

26 6. Plaintiff's claim for rescission fails because plaintiff has not stated a valid cause of
 27 action underlying the remedy. Rescission is a remedy, not an independent cause of action.
 28 *People ex rel. Kennedy v. Beaumont Inv., Ltd.*, 111 Cal. App. 4th 102, 133 (2003).

[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS
 sf-2078169

1 7. Plaintiff's claim for accounting fails because plaintiff has not stated a valid cause
 2 of action underlying the remedy. *Duggal v. G.E. Capital Commc'ns Servs., Inc.*, 81 Cal. App. 4th
 3 81, 95 (2000) ("right to an accounting is derivative and depends on the validity of a plaintiff's
 4 underlying claims").

5
 6 Dated: MAR 8 2006, 2006

PETER J. BUSCH

The Honorable Peter J. Busch
 Judge of the Superior Court

EXHIBIT F

ORIGINAL
FILED
08 MAY 28 PM 2:22
RICHARD W. WILKING
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

1 Scott H. Jacobs (SBN 81980)
2 Christopher O. Rivas (SBN 238765)
3 REED SMITH LLP
4 355 S. Grand Avenue, Suite 2900
5 Los Angeles, CA 90071
6 Telephone: 213.457.8000
7 Facsimile: 213.457.8080

8 Attorneys for Defendants
9 WMC Mortgage, LLC and
10 GE Consumer Finance, Inc.

11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

13 PATRICIA C. BARBERA,

14 Plaintiff

15 vs.

16 WMC MORTGAGE CORPORATION, a
17 California corporation; aka WMC Direct, a
18 California Business Entity; GE Consumer
19 Finance, a unit of General Electric
20 Company; Select Portfolio Servicing
21 Corp., a Utah Corporation; Fairbanks
22 Holding Corporation, a Delaware
23 Corporation; and Land Title Company of
24 Marin, a California Business Entity;
25 Does 1 thru 100, inclusive.

26 Defendants.

Case No. CV 08-2677

[Removal from Superior Court of
California, County of Marin,
Case No. CV 081763]

PJH

**DEFENDANTS WMC MORTGAGE,
LLC AND GE CONSUMER
FINANCE, INC.'S NOTICE OF
REMOVAL OF ACTION PURSUANT
TO 28 U.S.C. §§ 1331 AND 1441**

[FEDERAL QUESTION]

REED SMITH LLP

A limited liability partnership formed in the State of Delaware

1 TO THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE
2 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION:

3
4 PLEASE TAKE NOTICE THAT defendants WMC Mortgage, LLC ("WMC
5 Mortgage") (successor in interest to "WMC Mortgage Corporation") and GE
6 Consumer Finance, Inc. ("GECF") hereby remove this action from the Superior Court
7 of California, County of Marin, to the United States District Court for the Northern
8 District of California, pursuant to 28 United States Code Sections 1331 and 1441
9 (Federal Question). The removal of this action is based on the following:

10
11 **I. REMOVAL IS PROPER BECAUSE THIS COURT HAS SUBJECT**
12 **MATTER JURISDICTION PURSUANT TO 28 U.S.C. § 1331 AND § 1441**

13 1. On April 11, 2008, plaintiff Patricia C. Barbera ("Plaintiff") filed
14 an action in the Superior Court of the State of California for the County of Marin,
15 entitled *Patricia C. Barbera v. WMC Mortgage Corporation, et al.*, as Case
16 Number CV 081763. A true and correct copy of the Complaint is attached hereto
17 as Exhibit "A."

18 2. Plaintiff's lawsuit arises from a loan she obtained from WMC
19 Mortgage on June 11, 1997. Plaintiff alleges, *inter alia*, that WMC Mortgage failed
20 to provide her with certain disclosures required by the federal Truth in Lending Act
21 ("TILA") and the federal Home Owners Equity Protection Act (HOEPA) when she
22 obtained her loan. Specifically, she alleges WMC Mortgage failed to provide her
23 with a "right to rescind" disclosure required by the TILA. She also alleges that
24 when she attempted to rescind her loan with WMC Mortgage, WMC Mortgage
25 refused to execute the rescission. Additionally, she alleges that WMC Mortgage
26 billed her for improper charges, and subsequently failed to respond to her written
27 request disputing those charges, thus violating the federal Real Estate Settlement
28

REED SMITH LLP
A limited liability partnership formed in the State of Delaware

REED SMITH LLP
A limited liability partnership formed in the State of Delaware

1 Procedures Act ("RESPA"). Plaintiff further alleges that WMC Mortgage violated
2 the federal Fair Debt Collection Practices Act by providing inaccurate credit
3 reports. Plaintiff alleges a total of 15 causes of action: (1) Request for Specific
4 Performance; (2) Action to Quiet Title; (3) Slander of Title; (4) Violation of the
5 federal Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*, and the federal
6 Home Ownership and Equity Protection Act ("HOEPA"), 15 U.S.C. § 1639; (5)
7 Violation of the federal Real Estate Settlement Procedures Act ("RESPA"), 12
8 U.S.C. § 2605 *et seq.*; (6) Unlawful predatory lending practices; (7)
9 Misrepresentation and Inducement; (8) Harassment; (9) Violation of the federal
10 Fair Debt Collections Practices Act, 15 U.S.C. § 1692, and RESPA, 12 U.S.C. §
11 2605; (10) Breach of Contract in violation of the TILA, 15 U.S.C. § 1601 *et seq.*,
12 the RESPA, 12 U.S.C. § 2605 *et seq.*, and the HOEPA, 15 U.S.C. § 1639; (11)
13 Unjust Enrichment; (12) Fraudulent Accounting; (13) Breach of Fiduciary Duty;
14 (14) Negligence; and (15) Unclean Hands, against WMC Mortgage and GECF.

15
16 3. This action is a civil action over which this Court has original
17 jurisdiction under 28 U.S.C. Section 1331, and is one which may be removed to this
18 Court pursuant to the provisions of 28 U.S.C. Section 1441 in that it is a civil action
19 arising under the laws of the United States, namely the TILA, the RESPA, the
20 FDCPA, and the HOEPA.

21 **II. THE PROCEDURAL REQUIREMENTS FOR REMOVAL ARE**
22 **SATISFIED**

23 4. On or about April 29, 2007, WMC Mortgage received a copy of
24 the Complaint and a Summons. A true and correct copy of the Summons is
25 attached hereto as Exhibit "B." This Notice of Removal is therefore timely filed
26 under 28 U.S.C. § 1446(b).
27
28

1 5. The Superior Court of California for the County of Marin is
 2 located within the Northern District of California, San Francisco Division. *See* 28
 3 U.S.C. § 84(c)(2). Thus, venue is proper in this Court because it is the “district and
 4 division embracing the place where such action is pending.” 28 U.S.C. § 1441(a).

5 6. A search of the Marin County Superior Court files and docket
 6 sheet in this action on May 28, 2008 showed no proof of service or other record
 7 indicating that defendants Select Portfolio Servicing Corporation, Fairbanks
 8 Holding Corporation, and Land Title Company of Marin have been served in this
 9 action. Declaration of Scott H. Jacobs at ¶ 3. Accordingly, the joinder of these
 10 unserved defendants in this Notice of Removal is not required. *Salveson v. Western*
 11 *States Bankcard Assn.*, 731 F.2d 1423, 1429 (9th Cir. 1984).

12 7. No previous request has been made for the relief requested herein.
 13

14 8. In compliance with 28 U.S.C. 1446(d), WMC Mortgage and
 15 GECF will serve on Plaintiff a Notice to Plaintiff of Filing Notice of Removal,
 16 attaching a copy of this Notice of Removal, and will file the same with the Clerk of
 17 the Superior Court of California, County of Marin.
 18

19 ///

20
 21 ///

22
 23 ///

24
 25 ///

26
 27 ///

28

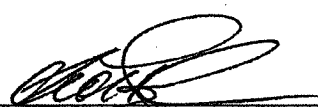
REED SMITH LLP
 A limited liability partnership formed in the State of Delaware

1 WHEREFORE, WMC Mortgage and GECF respectfully remove this action
2 from the California Superior Court for the County of Marin to this Court pursuant
3 to 28 United States Code Sections 1331 and 1441.

4 DATED: May 28, 2008

REED SMITH LLP

By


Scott H. Jacobs
Christopher O. Rivas
Attorneys for Defendants
WMC Mortgage, LLC and
GE Consumer Finance, Inc.

11 DOCSLA-15641583.1

REED SMITH LLP
A limited liability partnership formed in the State of Delaware

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. I am employed in the office of a member of the bar of this court at whose direction the service was made. My business address is REED SMITH LLP, 355 S. Grand Avenue, Suite 2900, Los Angeles, CA 90017.

On June 2, 2008, I electronically filed the following document(s) with the Clerk of the Court using the CM/ECF system, which sent electronic notification of such filing to all other parties appearing on the docket sheet, as listed below.

DEFENDANTS WMC MORTGAGE, LLC AND GE CONSUMER FINANCE. INC.'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF THEIR ADMINISTRATIVE MOTION TO CONSIDER WHETHER CASES SHOULD BE RELATED

Patricia C. Barbera
24 Caribe Isle
Novato, CA 94949
Telephone: (415) 382-9617
Facsimile: (415) 382-0756
In Pro Per

I declare under penalty of perjury under the laws of the United States that the above is true and correct. Executed on June 2, 2008, at Los Angeles, California.

/s/ Patty Keen
Patty Keen